Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WEBCOR PACKAGING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an employee group must act in a representational capacity in order to be a "Labor Organization" as defined under 29 U.S.C. § 152(5).

Whether an employee group is "dealing with" an employer as defined under 29 U.S.C. § 152(5) wherein the group addresses wages, hours, working conditions and other terms of employment and makes suggestions or provides input to the employer and the employer acts upon the suggestions or input.

Whether an employer violates 29 U.S.C. § 158(a)(2) by establishing an employee group when the employer, in establishing such group, does not have the motive of discouraging employees from organizing for the purposes of collective bargaining.

PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND SUBSIDIARIES

The Petitioner is Webcor Packaging, Inc. The Respondent is the National Labor Relations Board. There is no parent company or non-wholly owned subsidiary of Petitioner Webcor Packaging, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Webcor Packaging, Inc. respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, (App., *infra*, at 1a), is reported at 118 F.3d 1115. The opinion of the National Labor Relations Board, (App., *infra*, at 19a), is reported at 319 NLRB 1203. The opinion of Administrative Law Judge Stephen J. Gross, (App., *infra*, at 34a), is unreported.

JURISDICTION

The Court of Appeals entered its Judgment on July 11, 1997. (App., *infra*, at 1a.) An order granting Petitioner a 30 day extension to file this petition was entered by this

Court on October 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2), provides that '[i]t shall be an unfair labor practice for an employee . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5), provides that a "labor organization" is "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

STATEMENT

A. Background and Facts

This case involves the extent to which employers, whose employees are not represented by a union, can communicate with their employees concerning matters directly related to their employment. In an ever increasingly competitive global marketplace, employers in this country have come to the realization that they must involve their employees in the decision making process. As a result, employee involvement programs have been used by employers to increase employee satisfaction and, thus, increase efficiency, effectiveness, and productivity.

Webcor Packaging, Inc. is a manufacturer of corrugated boxes and is located in Burton, Michigan. (App.,

infra, at 35a.) The plant has approximately forty (40) production and maintenance employees.

Compak is also in the business of manufacturing corrugated boxes and is owned by the same individuals who own Webcor. The Compak plant is located in Duren, Michigan and has been organized by the Allied Industrial Workers for approximately twenty-five (25) years.

The Allied Industrial Workers (AIW) attempted to organize the employees at Webcor in 1989. An election was held and the employees voted against AIW representation. (*Id.* at 38a.)

Craft-Barresi, a labor consulting firm, was hired by the Company to conduct a survey of employees' concerns and attitudes in the spring of 1990. The results of the survey showed that the employees wanted to be more adequately informed of any changes that management wished to implement.

In September of 1990, Robert Sibilsky was hired as the Vice-President of Operations at Compak-Webcor. (*Id.* at 2a.) As Vice-President of Operations, Mr. Sibilsky is responsible for manufacturing and administration at both the Compak and Webcor plants. At the time he began with Webcor, Mr. Sibilsky did a thorough evaluation of the Company which included discussions with managers, employees, customers and employees of Craft-Barresi. One of the conclusions of Mr. Sibilsky's evaluation was that an Employee Involvement Program needed to be implemented at Webcor. (*Id.* at 36a-37a.)

In October of 1990, Mr. Sibilsky met with Frank Barresi, a labor consultant with Craft-Barresi, to discuss implementation of an Employee Involvement Program at Webcor. (*Id.* at 38a.) A decision was made to implement a two-pronged program. The first prong would be the implementation of an Employee Involvement Steering Committee. (*Id.* at 2a.) The Steering Committee would operate as the coordinating body of the program and

would address issues related to productivity, quality, safety, housekeeping and waste. The second prong, the Plant Council, would be the development of a standing body which would discuss policy issues. The purpose of the Plant Council was to be an information sharing, communication device in these areas. (*Id.*)

A sign up sheet for the Steering Committee was posted on the employees bulletin board on November 20, 1990. The Steering Committee was ultimately made up of three (3) hourly employees and two (2) management people. (*Id.*) The three (3) hourly members of the Steering Committee were determined by placing the names of the volunteers in a box and randomly drawing three (3) names. (*Id.* at 37a.) The majority of the Committee was made up of hourly employees so that the employees knew the program was to be balanced. Olin Rikard, Manufacturing Manager, and Ken Lieben, a supervisor, served as the management personnel on the Steering Committee.

The Steering Committee was established on December 20, 1990. The first meeting of the Steering Committee took place on January 3, 1991, (*id.*), the purpose of which was to discuss the organizational structure of the Employee Involvement Program and how the Committee should operate.

The Committee began reviewing suggestions received from individual employees at the third and fourth meetings on January 10 and January 17, 1991. The issues which came before the Committee included overtime distribution, tool policy and the lunch program. (*Id.* at 10a n.6.) These were clearly policy issues which were not intended to be addressed by the Steering Committee.

After reviewing the types of issues which were coming before the Steering Committee, Mr. Sibilsky decided, in late January, that the Plant Council should be implemented. (*Id.* at 38a-39a.) Mr. Sibilsky determined that this would allow the Steering Committee to focus on the areas which it was created to focus on (*i.e.*, safety, quality, productivity, housekeeping and waste).

A memo was sent from Mr. Sibilsky to Olin Rikard instructing him to move forward with the Plant Council. The Plant Council was to consist of five (5) hourly employees and three (3) management people. (*Id.* at 3a.) This make up of the Plant Council was determined by the Steering Committee. A notice was posted to the employees informing them that a Plant Council was to be formed and an election to determine the hourly members would take place on February 22, 1991. (*Id.* at 2a.)

That same month, Mr. Sibilsky learned that the Teamsters were attempting to organize the facility. The organizing effort, however, did not motivate, and had no effect, on the decision to implement the Plant Council. (*Id.* at 2a, 39a.)

An election to determine the hourly employees who would sit on the Plant Council was held, as scheduled, on February 22, 1991. However, several of the ballots were turned in blank. Therefore, the Company decided not to implement the Plant Council at this time due to the employees lukewarm support and the Teamsters organizing drive. (*Id.* at 2a.)

The National Labor Relations Board conducted an election on April 18, 1991 to determine if the Teamsters had the support of a majority of employees. The Teamsters lost the election by a vote of 21 to 14. (*Id.* at 3a.)

Subsequent to the NLRB election, the Company solicited volunteers to serve on the Plant Council. Several employees volunteered and an election was held to determine who would be the five (5) hourly members of the Plant Council in May of 1991. (*Id.*) The first meeting of the Plant Council also took place in May of 1991.

Issues come before the Plant Council by means of a suggestion box located in the plant. The suggestions placed in the box must be signed by the individual or they will not be addressed. (*Id.* at 42a.) The individual employee then attends the meeting to discuss his or her sug-

gestion or idea. (*Id.* at 43a.) The Plant Council alternates individuals who are used as facilitators for the discussions.

The minutes of the meetings are taken from the notes of Olin Rikard and one of the hourly employees. The dates of the meetings are set at a time when all of the members can attend. (*Id.* at 45a-46a.) The times of the meetings alternate to accommodate the members who work on different shifts.

Employees are paid for their time spent attending Plant Council meetings as well as Steering Committee, Productivity and Safety meetings. (*Id.* at 46a.) Any necessary materials are also provided to all of the committees. (*Id.*)

B. Proceedings Below

A hearing was held in this matter before Administrative Law Judge Stephen J. Gross on October 29 and 30, 1992 pursuant to unfair labor practice charges and election objections filed by Local 332, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereinafter the "Union"). Judge Gross issued his decision on October 28, 1993. Judge Gross held that Petitioner had dominated or interfered with the formation or administration of a labor organization in violation of 29 U.S.C. Section 158(a)(2) and further ordered that the results of the election conducted on April 18, 1992 should be set aside based upon Petitioner's actions with respect to the Plant Council prior to the election. (App., *infra*, at 51a-52a.)

The Petitioner filed Exceptions to Judge Gross's Decision with the Board. On December 18, 1995, the National Labor Relations Board (hereinafter "Board") issued its Decision upholding Judge Gross's Decision. (*Id.* at 28a.)

The Board, pursuant to 29 U.S.C. Section 160(e), filed an application for enforcement of its Order issued on December 18, 1995 against Webcor Packaging, Inc. with

the United States Sixth Circuit Court of Appeals. The Sixth Circuit issued its Decision upholding the Board on July 11, 1997. The Petitioner now brings this Petition for a Writ of Certiorari. (*Id.* at 1a.)

REASONS FOR GRANTING THE PETITION

This case involves issues which will determine the ability of U.S. employers to compete with foreign companies in an increasingly competitive global marketplace. Additionally, the resolution of the issues in this case will determine whether non-union employees in this country, approximately ninety percent of the U.S. private sector workforce,* will be able to communicate with their employer concerning matters directly related to their employment.

In the last twenty (20) years, U.S. employers have become increasingly aware of the need to involve employees in the decision making process. As a result, employers have developed employee involvement programs. These programs are now being used on a world-wide basis to increase employee satisfaction and, thus, productivity and efficiency. The Board's interpretation of the National Labor Relations Act prohibits employers whose employees have not opted in favor of union representation and collective bargaining from establishing employee involvement programs that address issues directly related to the employees' employment (i.e. wages, hours, working condition, etc.). The employees' inability to be involved in issues critical to their livelihood decreases their job satisfaction and, ultimately, their effectiveness. This puts domestic employers at a distinct disadvantage in comparison to their foreign counterparts.

The Petitioner, in this case, established an employee involvement program to receive input from its employees in order to make an informed decision concerning the

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* Bureau of Labor Statistics, Bureau of Labor Statistics News Release, USDL 97-27 at 1 (Jan. 31, 1997).

employees' needs and desires. The Board, as has consistently been its practice, found the employee involvement program to be a violation of the National Labor Relations Act.

I. REVIEW BY THIS COURT IS NEEDED TO RESOLVE AN IMPORTANT, RECURRING QUESTION OF FEDERAL LABOR LAW THAT THE NLRB AND THE FEDERAL CIRCUIT COURTS HAVE FAILED TO RESOLVE, I.E., WHETHER REPRESENTATION IS A NECESSARY ELEMENT OF A "LABOR ORGANIZATION" UNDER 29 U.S.C. § 152(5).

A "Labor Organization" is defined under 29 U.S.C. § 152(5) as follows:

> Any organization of any kind or agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Board, as well as the various federal circuit courts, have failed to resolve the question of whether, under 29 U.S.C. § 152(5), an employee group must act as a representative of the other employees to meet the definition of a labor organization.

The Board noted in *Electromation*, 309 N.L.R.B. 990, 142 L.R.R.M. 1001 (1992), that the issue has not been resolved:

> Because we find, as explained below, that employee-members of the Respondent's action committees acted in a representational capacity, it is unnecessary to the disposition of this case to determine whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of other employees. As set forth in his separate concurrence, Member Devaney would reach this issue, and he concludes that such a finding is essential to a determination that

> a group is a labor organization within the meaning of Section 2(5).

Electromation, 309 N.L.R.B. at 994 n.20.

The unresolved nature of this issue has been confirmed by subsequent decisions of the Board and Courts of Appeal. *Webcor Packaging, Inc.,* 319 N.L.R.B. 1203, 151 L.R.R.M. 1221 (1995), *Electromation v. N.L.R.B.,* 35 F.3d 1148, 147 L.R.R.M. 2257 (7th Cir. 1994), *N.L.R.B. v. Webcor Packaging, Inc.,* 118 F.3d 1115 (6th Cir. 1997).

A labor organization must, by its very nature, be a representative of its members. The Board has failed to acknowledge the representational requirement for a labor organization. This position by the Board has had the effect of requiring compulsory membership in a union for an employee to communicate with his or her employer about issues closely related to his or her employment. In fact, the Board, by failing to address this issue, has been able to consistently conclude that employee groups discussing grievances, labor disputes, wages, rates of pay, hours of employment, or conditions, of work with their employer are per se labor organizations which have been dominated by the employer in violation of 29 U.S.C. § 158(a)(2). *Garney Morris, Inc.,* 313 N.L.R.B. 101, 146 L.R.R.M. 1153 (1993), *Ryder Distribution Resources, Inc.,* 311 N.L.R.B. 814, 143 L.R.R.M. 1225 (1993), *Waste Management of Utah,* 310 N.L.R.B. 883, 144 L.R.R.M. 1315 (1993), *Yukon Manufacturing Co.,* 310 N.L.R.B. 324, 144 L.R.R.M. 1070 (1993), *Research Federal Credit Union,* 310 N.L.R.B. 56, 142 L.R.R.M. 1250 (1993), *F.M. Transport, Inc.,* 306 N.L.R.B. 757, 139 L.R.R.M. 1389 (1992), *Airstream, Inc.,* 288 N.L.R.B. 220, 130 L.R.R.M. 1281 (1988), *Schwab Foods, Inc.,* 284 N.L.R.B. 1055, 125 L.R.R.M. 1225 (1987), *Camvac International Inc,* 288 N.L.R.B. 816, 130 L.R.R.M. 1447 (1988), *UARCO, Inc.,* 286 N.L.R.B.

55, 130 L.R.R.M. 1447 (1988), *Memphis Truck & Trailer, Inc.*, 284 N.L.R.B. 900, 126 L.R.R.M. 1326 (1987).

The Board's failure to address this issue has a chilling effect on the communication channels between non-union employees and their employers. Employers who do not wish to violate the law are forced to eliminate any meaningful communication channels they have with their employees. This is especially problematic for employers who have large numbers of employees. For a large employer, communicating directly with every employee is virtually impossible. Through employee involvement programs, employers are able to systematically determine the perceptions, attitudes and opinions of their employees.

The Board's position eliminates the possibility for an employer to communicate directly with a small number of employees, who voice their individual concerns, to determine the desires of the employees. A large employer is effectively stymied in its attempts to get meaningful input from its employees prior to making a decision that will have a long-lasting effect on the employees' daily lives.

The Plant Council, in the instant case, lacks the representational status which should be a requirement for a group to be considered a labor organization. The members of the Council are not representing the other employees in the plant. The employees in the plant are required to attend any meeting at which a suggestion of theirs is to be addressed. Thus, every employee is not only able, but required, to communicate their ideas or suggestions to management without the need of a member of the Plant Council to do so for him. The Administrative Law Judge found, and the Board supported this finding, that the members of the Plant Council acted in a representational capacity simply because they were elected. (App., *infra*, at 23a.) This fact alone is not sufficient to support a finding that the employees acted in a repre-

sentational capacity. The Sixth Circuit's notation that the Plant Council members canvassed employees for their opinion on one occasion is a self-serving conclusion and not supported by the record evidence. As Administrative Law Judge Stephen J. Gross reasoned:

> Unlike *Electromation* (at fn. 7), *the employee members of Webcor's Plant Council were not instructed "to go amongst the other employees and find out what kind of ideas they had." (Employees generally were invited to suggest matters for consideration by the Plant Council; however I do not consider that to mean that the employee-members of the Council acted in a representative capacity.) Rather, I got the impression that the employee-members of the Plant Council voiced their own thoughts about how to deal with whatever issue was on the table, without concerning themselves about whether those thoughts necessarily mirrored the points of view of the plant's employees generally.* And the testimony of employee Plant Council member Mathew Newcomb indicates that representation was not what the members of the Plant Council—either employee-members or management-members—had in mind: According to Newcomb, "we [the Plant Council members] are hoping to settle the problems and make the hourly employees and management see the same thing at the same level."

(App., *infra,* at 47a-48a) (emphasis added).

It is clear that the members of the Plant Council do not act in a representative capacity. Without the representational element, a labor organization cannot exist. However, despite the lack of this representational element, the Board, and the Sixth Circuit, erroneously found the Plant Council to be a labor organization under 29 U.S.C. § 152(5). Therefore, it is imperative for this Court to review this unsettled area of the law.

II. REVIEW BY THIS COURT IS NEEDED BECAUSE THE NLRB'S INTERPRETATION OF "DEALING WITH" FOR THE PURPOSES OF DETERMINING WHAT CONSTITUTES A "LABOR ORGANIZATION" IS NOT CONSISTENT WITH THE PURPOSES OF THE NLRA.

The congressional intent in enacting 20 U.S.C. § 158 (a)(2) is clear. The provision was enacted in order to eliminate the creation of "sham" unions by employers which gave the employees the perception that they were being represented by a bargaining agent. *Electromation,* 309 N.L.R.B. at 999 (Member Devaney, concurring). The perception created by the employer-initiated body had the effect of eliminating the employees' rights to representation under 29 U.S.C. § 157(a). Thus, Congress enacted Section 8(a)(2) prohibiting an employer from dominating or interfering with the formation or administration of a labor organization or contributing financial or other support to it.

This Court addressed what constitutes "dealing with" for purposes of a "labor organization" in *N.L.R.B. v. Cabot Carbon,* 360 U.S. 203, 79 S. Ct. 1015, 3 L. Ed. 2d 1175 (1959). In *Cabot Carbon,* this Court held that the term "dealing with" is broader than "bargaining with." However, the Court provided no other guidance as to what is, and what is not, encompassed within the term "dealing with."

The Board's practice has been to summarily conclude that any employer/employee group which discusses, even slightly, an issue related to wages, grievances, hours of employment, or conditions of work is "dealing with" the employer as defined in Section 2(5). *Ryder Distribution Resources, Inc.,* 311 N.L.R.B. 814, 143 L.R.R.M. 1225 (1993), *Waste Management of Utah,* 310 N.L.R.B. 883, 144 L.R.R.M. 1315 (1993), *Research Federal Credit Union,* 310 N.L.R.B. 56, 142 L.R.R.M. 1250 (1993), *F.M. Transport, Inc.,* 306 N.L.R.B. 56, 139 L.R.R.M.

1389 (1992), *Airstream, Inc.*, 288 N.L.R.B. 220, 130 L.R.R.M. 1281 (1988), *Camvac International, Inc.*, 288 N.L.R.B. 816, 130 L.R.R.M. 1447 (1988). In *Electromation,* the Board stated the following:

> . . . we review "dealing with" as a bilateral mechanism involving proposals from the employee committee concerning subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management . . .

Electromation, 309 N.L.R.B. 995 n.21.

In practice, the Board has concluded that this Court's holding in *Cabot Carbon* was that "dealing with" is all encompassing. The Board routinely finds that committees which address the subjects listed in Section 2(5) are "dealing with" the employer.

Under the Board's application of the law, employee involvement programs cannot exist in this country. The Board's position is that unilateral mechanisms are acceptable while bilateral mechanisms are not. However, in determining what constitutes a unilateral, as opposed to a bilateral, mechanism, the Board reviews whether an employer acts upon the input received from its employees. *See* (App., *infra,* at 21a.)

This is a ludicrous application of the law set out in *Cabot Carbon* and is totally at odds with today's work environment. In other words, the Board would allow an employer to solicit information from its employees. However, if the employer acts upon the information received, it is "dealing with" the employees. This eliminates any meaningful communication between the parties, frustrates both the employer and employee, and has the effect of requiring compulsory membership in a union for an employee to discuss employment issues with his or her employer.

As stated earlier, employee involvement has become an integral part of the modern workplace. In order to be

successful in today's global marketplace, employers have become increasingly aware of the need to communicate with their employees and to use that information to operate more effectively and efficiently. In fact, Administrative Law Judge Stephen Gross acknowledged that this was taking place at Petitioner's operations:

> . . . According to Sibilsky's credible testimony, what Sibilsky calls "employee involvement" at Consolidated Packaging led to exceedingly high quality in that plant's output—levels of quality that were, in fact, higher than at Webcor. Sibilsky accordingly was an apostle of employee involvement when he began his management at Webcor.
>
> By "employee involvement" Sibilsky means a way of operating a plant: (1) that calls on employees, as well as management, to think up better ways of operating, primarily in respect to matters that affect productivity, quality, safety, plant cleanliness, and reduction in waste; (2) in which management proceeds in a manner that evidences a respect for what employees have to say about how things should be done in the plant; and (3) under which small numbers of employees and supervisors meet as committees in order to thrash out the best ways to improve operations and deal with problems as they crop up.
>
> Sibilsky credibly testified that, as he sees things, unless managers of manufacturing operations do utilize employee involvement programs, competitive levels of quality and low cost can not be achieved. In Sibilsky's words:
>
> > What surfaced in the mid-80's was something that we really knew a long time ago . . . but we didn't utilize it—the way we were going to achieve . . . quality and low cost was by involving all the people in our operation in thinking. Not checking their brains at the door, but thinking about and participating in how we are going to get better at what we do. Because if we don't

> get better .. . we're not going to get any business. We will not be there. It is that simple.
>
> Sibilsky found no employee involvement in the problem-solving process when he arrived at Webcor; what was in place, as Sibilsky testified, was a "top-down type of arrangement . . . The solutions were always top down. [The employees] weren't asked for their input on solutions to . . . quality problems, productivity problems, or the rest of it." (Sibilsky defined "top-down management" this way: where the managers of a plant, rather than asking the employees how a problem can be solved, "take it upon themselves to analyze the problem, and determine what the issues are, and then force the solution down the pipe.")

(App., *infra*, at 35a-36a.)

In order for U.S. companies to remain competitive, the employee involvement process discussed above is imperative. Employers unsuccessfully attempted to compete with their global competition by using "top-down management" in the past. The Board's policy has the effect of forcing employers to go back to this unsuccessful management style. Therefore, the Petition should be granted in the instant case in order to clarify, based on today's work environment, what constitutes "dealing with" for the purposes of 29 U.S.C. § 152(5).

III. REVIEW BY THIS COURT IS NEEDED TO RECTIFY THE NLRB'S POLICY OF FINDING AN EMPLOYER, WHO DOES NOT HAVE THE MOTIVE OF DISCOURAGING EMPLOYEES FROM ORGANIZING FOR THE PURPOSES OF COLLECTIVE BARGAINING, VIOLATES 29 U.S.C. § 158(a)(2) WHEN IT ESTABLISHES AN EMPLOYEE GROUP TO DISCUSS EMPLOYMENT RELATED ISSUES.

The NLRB has consistently held that an Employer establishing an employee group to discuss issues related to their employment is in violation of 29 U.S.C. § 158

(a)(2). As stated earlier in this Petition, 29 U.S.C. § 158 (a)(2) was enacted in order to stop employers from interfering with employee rights under 29 U.S.C. § 157. Employers would create "sham" unions in an attempt to discourage employees from organizing.

Since the enactment of 29 U.S.C. § 158(a)(2), the employer/employee relationship has changed dramatically. Employers from around the world have come to accept the fact that a cooperative, as opposed to adversarial, relationship is necessary to compete in a global marketplace. Therefore, strong communication lines between employer and employee are now viewed as a necessity to ensure quality, productivity, safety, and efficiency.

As a result of this philosophical change, employee involvement has developed as a tool used by companies to make full use of their greatest asset, their employees. Employers have come to the realization that without the direct information they receive from employees, their opportunity for success in the global marketplace is greatly diminished. Therefore, an employer's motive in developing an employee involvement program is to succeed in the marketplace.

However, despite this change in the attitudes of both employers and employees, the NLRB still routinely finds employee groups established by an employer to be in violation of 29 U.S.C. § 158(a)(2). The NLRB has failed to properly enforce the Act in a manner which is consistent with the intent of Congress in enacting 29 U.S.C. § 158(a)(2). The intent was to prohibit employers, whose motive was to discourage employees from organizing for the purposes of collective bargaining, from establishing employee groups. The NLRB's policy of enforcement improperly prohibits the employer from establishing employee groups to communicate with employees regardless of the employee's motive. Therefore, the Petition should be granted in order to rectify the

Board's enforcement policy which is inconsistent with the purposes of the Act.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 7, 1997

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-5423

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEBCOR PACKAGING, INC.,
Respondent.

On Application for Enforcement of an Order of the
National Labor Relations Board
Nos. 7-CA-31809, 7-CA-31896, 7-RC-19513

Argued: April 28, 1997
Decided and Filed: July 11, 1997

Before: GUY, MOORE, and COLE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which COLE, J., joined. GUY, J. (p. 18), delivered a separate opinion concurring in the result only.

OPINION

KAREN NELSON MOORE, Circuit Judge. The National Labor Relations Board (NLRB) petitions this court to enforce its order setting aside union election re-

sults and disestablishing a labor organization which Webcor created and dominated in violation of § 8(a)(2) of the National Labor Relations Act (NLRA). For the reasons discussed below, we enforce the order.

I. FACTS

Neither party challenges the following findings of the Administrative Law Judge (ALJ): In 1990 Robert Sibilsky joined Respondent Webcor as vice-president for operations, bringing with him a new management strategy involving increased worker-management cooperation. He soon established an "Employee Involvement Steering Committee," composed of three workers and two managers, to investigate ways to improve safety, productivity, quality, and other areas that did not involve what he called "policy issues," i.e., employer-employee relations. The Steering Committee did not discuss employer-employee relations and is therefore not at issue in this case.

The Steering Committee was quite popular with the workers, but not in the way Sibilsky had hoped. The company had encouraged employees to submit suggestions to the committee; many of these suggestions turned out to concern employer-employee relations. Sibilsky's response was to propose the formation of another committee, a "Plant Council," to address these policy issues. At the same time, the Allied Industrial Workers Union started an organizing drive at Webcor (apparently as a result of other, less popular, changes that Sibilsky had instituted). The decision to create the Plant Council was apparently unrelated to the union activity.

On February 22, 1991, Webcor held an election for the employee members of the Plant Council; of the twenty-eight ballots cast, eighteen were blank. Furthermore, four of the five persons elected refused to serve. Sibilsky took this as an indication of indifference at best and temporarily scrapped the Plant Council idea. He nonetheless circulated a "Dear Employee" letter asking workers to vote

against unionization; the letter included a statement that the company had responded to employee concerns by "implement[ing]" the Plant Council and an employee involvement program in response to employee concerns. *See* Joint Appendix (J.A.) at 63 (Letter).[1]

On April 18 the workers voted against unionization by a twenty-one-to-fourteen margin. Two weeks later the company held another election for the Plant Council. This election was much more successful than the first and elected to the Council five workers, all of whom had volunteered to serve if elected.

The Plant Council included three management members as well as the five workers. Although in theory the Council was to make decisions by majority vote, in practice it worked by consensus. An employee who wanted to raise an issue before the Council would usually place a written suggestion in a box and then attend the meeting at which the suggestion was discussed. The Council was meant to, and did, address "work rules, wages, and benefits"; it in fact addressed and made several proposals that the company subsequently adopted. The Council met during working hours and the company covered all expenses, including wages for the time spent.

The Department of Labor brought this action claiming that the Council was an employee representation committee under company domination and as such violated the NLRA. Webcor replied that the Council was an exemplar of worker-management cooperation and merited praise rather than legal attack. The Department's view prevailed before the ALJ and the NLRB, both of which held that the Plant Council was an illegal company-dominated labor

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[1] The letter also proclaimed that "[t]hese responses to employees were made without a union! They occurred because of a cooperative spirit. Employee Involvement, developed long before the union was present, and Plant Council are designed to further develop that relationship." J.A. at 63.

organization and ordered the company to disestablish the Council and hold new union elections. The NLRB General Counsel now petitions to have the Board's order enforced. We have jurisdiction over such petitions under 29 U.S.C. § 160(e).

II. DISCUSSION

The National Labor Relations Act provides that it constitutes an "unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." NLRA § 8(a)(2), codified at 29 U.S.C. § 158(a)(2). The ALJ and the Board held that the Council was a labor organization and that the company dominated it; Webcor disputes both conclusions.

A. Whether the Plant Council is a Labor Organization under the Act

Webcor first argues that the Board erred in concluding that the Council was a labor organization. The NLRA defines "labor organization" as

> any organization of any kind, or any agency or *employee representation committee* or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (emphasis added). The Supreme Court has long held that this statutory definition is susceptible to a broad interpretation and that the Board should be accorded great latitude in delineating its contours. *See Marine Engineers Beneficial Ass'n v. Interlake, S.S. Co.*, 370 U.S. 173, 181-82 (1962); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 & n. 7 (1959). Webcor nonetheless contends that the Council is not a labor organization because (1) it did not "deal with" the company concerning work conditions, and (2) members of the Council did not represent other employees. Respondent's Br. at 12.

This Circuit has in recent years applied inconsistent standards in reviewing the Board's interpretation of the NLRA.[2] Just last year, however, the Supreme Court clearly stated its view that the courts must defer to the NLRB's interpretation of the Act under the two-step test of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Holly Farms Corp. v. NLRB*, —— U.S. ——, 116 S. Ct. 1396, 1401, 1406 (1996) (applying *Chevron* to Board adjudication). *Accord International Longshoremen's and Warehousemen's Union, Local 14 v. NLRB*, 85 F.3d 646, 652 (D.C. Cir. 1996) ("[P]ursuant to the precepts of *Chevron* . . ., we must defer to the Board's reasonable judgments regarding applications of the NLRA."). *See generally* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 3.5 at p. 120 (3d ed. 1994) ("Since Congress gave NLRB both the power to make policy decisions and the power to adjudicate, it is fair to infer that Congress delegated to NLRB the power to make binding policy decisions through the process of adjudication," and *Chevron* analysis is therefore appropriate.). "For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one." *Holly Farms*, 116 S. Ct. at 1406

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[2] *Compare Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 873 (6th Cir. 1997) (stating that "the Board's conclusions of law . . . are reviewed by this Court de novo," but noting that court should refuse enforcement if "order has no 'reasonable basis in law.'" (citing *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 368 (6th Cir. 1993)); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 462, 465 (6th Cir. 1996) (applying de novo review but asserting that court is "respectful of the Board's interpretation" of the law), *with Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1518 (6th Cir. 1996) (stating that de novo review applies) (citing *Pentre Elec.*); *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818, 826 (6th Cir. 1996) (reviewing Board's legal conclusions de novo); *Smiths Indus., Inc. v. NLRB*, 86 F.3d 76, 79 (6th Cir. 1996) (same) (citing *Pentre Elec.*).

(citations omitted). Thus, *Holly Farms* establishes the standard of review now binding on the courts of appeals in reviewing the NLRB's interpretation of the relevant provisions of the NLRA.[3] Under this standard, our first task is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress has done so, we must give effect to its expression. *Id.* at 842-43. If not, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *Accord Holly Farms*, 116 S. Ct. at 1406.[4]

The Board has held that a group constitutes a labor organization if it involves "(1) employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an "employee representation committee or plan' is involved, evidence that the committee is in some way representing the employees." *Electromation, Inc.*, 309 N.L.R.B. 990, 996 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).[5] This construction of the term is

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[3] To the extent that our prior statements of the standard of review conflict with *Holly Farms*, the Supreme Court decision has effectively overruled them. We note that none of the prior opinions from our circuit cite *Holly Farms* or *Chevron* for the applicable standard of review.

[4] If the Board had applied the statute inconsistently or had changed its construction of the statute without reasoned justification, *Chevron* deference would not be appropriate. *See Holly Farms*, 116 S. Ct. at 1404. That is not an issue in this case, as discussed below.

[5] The decisions in *Electromation* and *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993), discussed *infra*, were intended as "landmark" cases that would clarify the Board's policy concerning the distinction between permissible "quality circles" and illegal company unions. *See* Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331, 346-356 (1994) (discussing *Electromation* and *duPont*). Professor Moberly concludes that the Board has struck the correct

an entirely reasonable refinement of the statutory definition quoted above, and we must therefore adopt it under *Chevron*. There is no question that the Council involved employees and addressed conditions of employment. *See* Respondent's Br. at 9; J.A. at 60, 118, 138. Webcor asserts, however, that the Plant Council did not represent other employees and that it did not "deal with" the company.

1. Whether the Plant Council Represented Other Employees

Webcor's first argument is that the Plant Council was not a labor organization because it did not represent other employees. Instead, the company argues, the Council merely provided a forum for employees to make suggestions, which the Council then communicated to management. As its opinion below notes, the Board has yet to decide "whether an employee group could be found to constitute a labor organization absent a finding that it acted as a representative of other employees." J.A. at 5 n.6 (citing *Electromation*, 309 N.L.R.B. at 994 n.20,

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balance by allowing worker participation programs (which he endorses) while prohibiting the establishment of employee groups that companies will use to undermine workers' rights. Id. at 359. In the last few years Congress has attempted to amend the NLRA so as to overrule *Electromation*; the bill narrowly passed through both houses but was vetoed by the President. *See* Nancy K. Kubasek et al., *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the NLRA*, 34 HARV. J. ON LEGIS. 53, 53-55, 69 (1997) (discussing Teamwork for Managers and Employees Act (TEAM Act), which would have amended the NLRA so that "it [would] not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization . . . in which employees [deal with employers about] matters of mutual interest" unless the organization purported to be the employees' bargaining agent or union) (quoting H.R. 743, 104th Cong. (1995)). A similar proposal is currently pending in Congress. *See* S. REP. No. 105-12 (Teamwork for Employees and Managers Act of 1997).

which specifically reserved the issue). Because we affirm the ALJ's finding that the Council members did act as representatives, we need not address the novel legal question.

The ALJ's determination that the Plant Council members acted at least in part as representatives of other workers is one of fact, which we may not disturb so long as it is supported by substantial evidence. 29 U.S.C. § 160(e); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 898 (6th Cir. 1996). Even if this finding rests solely on an inference that the ALJ has drawn, it must stand unless that inference is unreasonable. *Id.* at 899.

The ALJ specifically noted that the Council was not meant to be a strictly representational body. J.A. at 18. However, he believed that the fact that the employee members were elected showed that they served at least in part as representatives: people vote for particular delegates because they hope that the person they elect will represent their views, either because the delegate shares them or because she will try to determine them. The Board gives further reasons to support this finding. First, that a proposed new attendance policy was circulated to all employees with instructions that they "respond back to the Plant Council," *see* J.A. at 16, 81, 90-92, supports the inference that the Council was meant to represent those employees who did respond. J.A. at 5 n.6. Furthermore, the minutes of some of the Council meetings suggest that the worker-members served to represent the whole class of employees. *See* J.A. at 69 (addressing "method of getting some response back from Plant Council to the employees"); J.A. at 75 (requesting management action on employee suggestion). Also, it appears from the record that, initially, suggestions to the Council were made in writing and then discussed without inviting the person who made the suggestion. J.A. at 79. Such a practice weakens the company's claim that the Council was only a forum for individual employees to air their ideas: when a group of

workers and management sits down to discuss suggestions made by absent workers it is reasonable to infer that the worker-members are representing their coworkers. Finally, if the Council was meant to get input from lots of individual employee members, it is hard to see why members were elected for such long (one-year) terms. *Cf. NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 290, 294-95 (6th Cir. 1982) (noting that "continuous rotation of Committee members" for three-month terms suggested that members acted as individuals rather than as representatives). In short, there is ample evidence supporting the ALJ's finding that the Council operated at least in part as a representative body, rather than a brainstorming group. *Cf. NLRB v. General Shoe Corp.*, 192 F.2d 504, 506, 507 (6th Cir. 1951) (holding similar committee to be labor organization), *cert. denied*, 343 U.S. 904 (1952).

2. Whether the Plant Council was Engaged in "Dealing with" Webcor

The Supreme Court has long held that Congress intended the phrase "dealing with" to include a much broader range of employer-worker interaction than would fall within the traditional concept of collective bargaining. *Cabot Carbon*, 360 U.S. at 213-214. More recently the Board has developed a fairly precise definition of the term, holding that "dealing with"

> ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by

> a management response of acceptance or rejection by word or deed, the element of dealing is missing.
>
> . . .
>
> [I]f the committee exists for the purpose of sharing information with the employer, the committee would not ordinarily be a labor organization. That is, if the committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information, the element of dealing is missing, and the committee would not be a labor organization.

E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993). We do not believe—and Webcor does not claim—that this is an unreasonable definition of the rather vague term "dealing." And, under this standard the ALJ's findings make it plain that the Council was created to, and did, deal with the employer: the Council made several specific suggestions to the company and the company responded by voluntarily adopting at least four of these.[6] This is a paradigm case of dealing. In fact, the Council is in this respect indistinguishable from the committees held to violate the Act in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 244-47, 251 (1939); *NLRB v. General Shoe Corp.*, 192 F.2d 504, 507 (6th Cir. 1951); and *NLRB v. Sharples Chemicals, Inc.*, 209 F.2d 645, 651-52 (6th Cir. 1954) (both cited with approval in *Cabot Carbon*, 360 U.S. at 212 n. 14). Webcor nonetheless claims that our more recent case law indicates that the Council did not deal with the company.

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[6] *See* J.A. at 15-16 (ALJ findings). These changes included a new policy whereby the company, rather than the individual workers, would purchase tools, J.A. at 234-36; a new policy equalizing eligibility for overtime, displacing the old seniority system, J.A. at 152, 163; a new policy whereby Webcor would annually purchase an additional pair of safety boots for those who needed them, J.A. at 151-52; and, a modification to a management-proposed change in the attendance policy, J.A. at 158, 91-92. There was also testimony that the Council's action had led to a new policy regarding vacation pay. J.A. at 150-51, 215-16.

Webcor first argues that the Council cannot be a labor organization under this court's holding in *Scott & Fetzer*, 691 F.2d at 295. We disagree. The *Scott & Fetzer* court's conclusion that the committee before it was not a labor organization rested on the lack of a "continuous interaction between employer and committee." *Id.* at 294. *See id.* ("Although *Cabot Carbon* cautions against a restrictive reading of the term 'dealing,' it involved a more active, ongoing association, between management and employees, which the term dealing connotes, than is present here."). The court noted that there was only one instance in which the employer changed a policy at the committee's request. *Id.* at 295 n.11. "An isolated incident does not convert the Committee into a labor organization."). This holding is, for the purposes of the matter at hand,[7] consistent with the Board's current definition of dealing, which excludes such "isolated instances in which the group makes ad hoc proposals to management followed by a management response." *DuPont*, 311 N.L.R.B. at 894. In the case at bar, the ALJ found that the company had made at least four significant policy changes as a result of the Council's recommendations. *See* note 6, above. This constitutes an active, ongoing course of dealings, and *Scott & Fetzer* is in this respect inapposite.

Webcor next cites *Scott & Fetzer* and *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989), for the proposition that because there is no evidence that the company formed the Plant Council out of hostility towards the union or in order to deceive employees or otherwise obstruct the unionization drive, the Council was not a labor organization. While we acknowledge that some of the lan-

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[7] The Board's definition does, however, indicate that, contrary to *Scott & Fetzer's* holding, a "recital of the committee's purpose" to deal could itself be sufficient evidence of dealings. *See duPont*, 311 N.L.R.B. at 894 ("If the evidence establishes . . . that the group exists for a purpose of following such a pattern or practice, the element of dealing is present.").

guage in these two cases suggests that the existence of employer bad faith is relevant in determining whether a particular group constitutes a labor organization under the Act, longstanding precedents from this circuit, the Supreme Court, and the NLRB, as well as the text of the statute itself, make it clear that bad faith is not a prerequisite to a finding that a company-sponsored group is a labor organization.

The statutory definition of "labor organization" makes no reference to employer bad faith or anti-union animus. Moreover, in *Newport News* the Court held that a finding that the employer had not interfered with union elections and that the employees were satisfied with a company-sponsored Employees' Representative Committee did not preclude the Board from finding the committee to constitute an illegal company-dominated labor organization. 308 U.S. at 248, 251. The Board continues to adhere to this holding. *See Electromation*, 309 N.L.R.B. at 995 n.24 (no need to prove anti-union motive or intent to interfere with right to unionize). This court, too, has upheld Board determinations that similar employee committees were labor organizations, without any showing of employer bad faith. *See, e.g., General Shoe*, 192 F.2d at 507; *Sharples Chemicals*, 209 F.2d at 651-62. We can, in fact, find no meaningful distinction between Webcor's Plant Council and the employee groups found to be labor organizations in each of these cases. *See Cabot Carbon*, 360 U.S. at 213-14; *Newport News*, 308 U.S. at 244-47; *Electromation*, 35 F.3d at 1161; *Sharples Chemicals*, 209 F.2d at 648-49; *General Shoe*, 192 F.2d at 505-06. The alleged labor organization in *Airstream*, on the other hand, was no more than a continuation of an earlier program involving employer-worker "rap sessions," which the Board had specifically found existed solely to facilitate communication and therefore not to constitute a labor organization. *See* 877 F.2d at 1295. The *Airstream* court in fact distinguished this employee group from similar

groups that we had found to constitute labor organizations on just this basis. *Id.* at 1297. Webcor's Plant Council is not merely a continuation of any legal employee-employer rap session program. In light of the holdings in *Cabot Carbon, Newport News, General Shoe,* and *Sharples Chemicals,* and of the deference that we must give the Board's determination as to what factors define the term labor organization as used in the NLRA, we conclude that this distinguishes the group at issue in *Airstream* from the Plant Council and the organizations in the cited cases, and that the Plant Council, like those other groups, constitutes a labor organization under section 29 U.S.C. § 152(5).[8]

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[8] Even if we found *Airstream* indistinguishable from the case at bar we would be hesitant to reverse the Board's holding that the Plant Council is a labor organization as defined by the Act. As noted above, the Supreme Court has recently repeated its holding that we must accept the Board's reasonable construction of ambiguous terms in the NLRB under *Chevron. Airstream* and *Scott & Fetzer,* gave no deference to the Board's reading of the Act: instead, they set out to provide what they considered to be an "enlightened view of the Act." *Scott & Fetzer,* 691 F.2d at 291. *See Airstream,* 877 F.2d at 1296 ("An overly broad construction of the statute would be as destructive of the objects of the Act as ignoring the provisions entirely.") (quoting *Scott & Fetzer,* 691 F.2d at 292). As discussed above, such policy questions are for the Board, not for the courts. *Airstream* and *Scott & Fetzer* therefore addressed a question—the best construction of the NLRA—which is not before us; the question before us is only whether the Board's reading of the Act is reasonable. *See Holly Farms,* 116 S. Ct. at 1406 ("For the Board to prevail, it need not show that its construction is the best way to read the statute . . . ."). And, as discussed in the text, because the Board's reading is consistent with a long line of holdings out of both the Supreme Court and this court, we believe it is quite reasonable. *Cf. Reich v. D.M. Sabia Co.,* 90 F.3d 854, 860 (3d Cir. 1996) (overruling prior panel's holding in part based on *Chevron*); *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers,* 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc) (holding that "if a panel finds that a NLRB interpretation of the labor laws is reasonable and consistent with those laws, the panel may adopt that interpretation even if circuit precedent is to the contrary" despite Circuit rule that one panel may not overrule another.). We note that the Board's opinion distinguished *Airstream* and *Scott & Fetzer*

B. Whether Webcor Dominated the Plant Council

Webcor next argues that, even if the Plant Council was a labor organization, Webcor did not dominate it. The Board has defined domination for the purposes of the statute:

> [A] labor organization that is the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function. However, when the formulation and structure of the organization is determined by employees, domination is not established, even if the employer has the potential ability to influence the structure or effectiveness of the organization. Thus, the Board's cases following *Cabot Carbon* reflect the view that when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment.

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from the case at bar, rather than taking a "nonacquiescence" approach and simply ignoring our precedent. This is also not an instance in which the Board has departed from the Supreme Court's interpretation of the statute. *Cf. Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990) (refusing to follow agency's new interpretation of statute which conflicts with century-old Supreme Court precedent). If Congress disagrees with the Supreme Court's interpretation of a statute it can be expected to amend the law. *See id.* at 131. Congress cannot, however, be expected continuously to revise statutes to address isolated lower court dicta with which it disagrees.

Electromation, 309 N.L.R.B. at 995-96 (footnote and citations omitted). The term "dominate," as used in the Act, is not self-defining and the Board's definition is not unreasonable. *See Newport News*, 308 U.S. at 249 (upholding finding of domination where company determined structure of organization and could choose whether to adopt recommendations); *Electromation*, 35 F.3d at 1163 ("The Board's interpretation of Section 8(a)(2) simply does not contravene the statutory language."); *Scott & Fetzer*, 691 F.2d at 291 (assuming domination where committee "was expressly mandated by the Company, and the Company controlled its composition and its meetings"); *Sharples Chemicals*, 209 F.2d at 652 (domination finding supported by evidence of employer financial support, management participation in committee and power to remove representatives by transferring them to different department). As the ALJ noted, the Plant Council here was created by management and could have been disbanded by management. *See* J.A. at 19. Furthermore, that it lacked independent means of support, met on company property during working hours, never met independent of management, and had its elections run by the company all support the finding of domination. J.A. at 19. *See NLRB v. H & H Plastics Mfg. Co.*, 389 F.2d 678, 680 (6th Cir. 1968). *See also Electromation*, 35 F.3d at 1170 (upholding finding of domination in similar situation); *NLRB v. Chardon Tel. Co.*, 323 F.2d 563, 564 (6th Cir. 1963) (per curiam) ("Employees are free to form their own independent organization, but the [NLRA] requires that any such organization shall be completely independent of the employer.") (citation omitted).

Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967), is not to the contrary. In *Modern Plastics* we distinguished between employer cooperation with, and domination of, a labor organization and concluded that the relationship in that case was one of cooperation. *Id.* at 204. Importantly, the evidence in that case was "limited

to actions which occurred after the formation of the Committee," *id.* at 203, whereas much of the evidence of domination in the case at bar relates to the company's role in creating the Council. Where, as in *Modern Plastics*, there is no evidence that the employer played an inappropriate role in the actual formation of the labor organization, a showing that the employer is actually exerting influence over the organization is needed to find domination. *Electromation*, 309 N.L.R.B. at 995-96 (quoted above). If the company itself creates the labor organization, however, such a showing of actual control is unnecessary.[9] *Id. See General Shoe*, 192 F.2d at 505, 507. The Board's determination that Webcor dominated the Plant Council is supported by substantial evidence.

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[9] William Gould, the current Chairman of the NLRB, has called for Congress to amend the NLRA to clarify the definition of "dominate" so as to make clear that employers may promote the formation of and cooperate with employee groups so long as the employees retain control over the organizations. *See, e.g.*, William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3, 11 (1996) ("Employers ought to be able to promote the creation of and to subsidize employee groups. . . . [T]he final and most important aspect of any change should be an assurance that such employee organizations will be autonomous, that is to say, that they can select their own representatives or leadership and determine what it is that they want to discuss with management and how their organization should be structured. . . . [T]he employer that promotes such an employee group must be prepared to allow for genuine employee participation in leadership as well as involvement on empolyment issues." Chairman Gould concurred in the Board's judgment below on the grounds that "the control exercised by the Respondent over the Plant Council is such that the freedom of choice and independence of action open to employees is too strictly confined within parameters of the Respondent's making for the Plant Council to be a genuine expression of democracy in the workplace." J.A. at 6-7 n.13 (citing *Keeler Brass Co.*, 217 N.L.R.B. 1110 (1995) (Gould, Chairman, concurring)).

C. The Scope of the Board's Remedy

Webcor's final argument is that, even if the Council violated the Act and the Board was correct in ordering its disestablishment, the Board erred in ordering that the union election results be set aside and new elections held. An order setting aside elections is not ripe for our review until subsequent elections are held, even when that order is consolidated with other questions that are immediately appealable. *United States Elec. Motors v. NLRB*, 722 F.2d 315, 320 (6th Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1216 (1984). *Accord NLRB v. Pizza Crust Co. of Penn., Inc.*, 862 F.2d 49, 50 (3d Cir. 1989) (collecting cases); *American Bread Co. v. NLRB*, 411 F.2d 147, 156 (6th Cir. 1969). The proper route for review is for the employer to refuse to recognize a subsequent, Board-ordered election on the grounds that the election was improper. *Electrical Motors*, 722 F.2d at 320. Accordingly, we have no jurisdiction over this part of the appeal and cannot address the merits of the issue. *Id.*

III. CONCLUSION

For the reasons discussed above, we ENFORCE the Board's order disestablishing the Plant Council and hold that we are without jurisdiction over that portion of the Order that requires new elections to be held.

CONCURRENCE IN RESULT ONLY

GUY, Circuit Judge, concurring in the result only. Because I believe that the result reached in this case no longer reflects congressional intent, it is with the greatest of reluctance that I concur. But for a presidential veto of amendatory legislation passed by Congress, what Webcor attempted to do here would be viewed against the backdrop of legislation more hospitable to concepts like plant councils.

In a similar vein, gratuitous on my part though it may be, I believe that the Board exceeded its authority when it ordered a new election. There is nothing in the record to indicate that the rejection of the union in the first election represented other than the clear will of a majority of the employees. The Plant Council at issue here was not even formed until after the election.

I realize, of course, that this issue is not now before us, and so I agree that we must enforce the Board's order.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 7-CA-31809, C-CA-31896, and 7-RC-19513

WEBCOR PACKAGING, INC.

and

LOCAL 332, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

December 18, 1995

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On October 28, 1993, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief to the General Counsel's answering brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs [1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as further discussed below and to adopt the recommended Order.

Background

The judge found that the Plant Council established at the Respondent's facility was a labor organization within the meaning of Section 2(5) of the Act, and that the Respondent violated Section 8(a)(2) of the Act by dominating and interfering with the formation and administration of the Plant Council and by contributing financial and other support to the Plant Council. We agree with the judge's findings, for the reasons set forth by him, and for the reasons set forth below.

Discussion

1. We agree with the judge's finding that the Plant Council satisfies the criterion set forth in Section 2(5) of the Act that a statutory labor organization is one that

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 133 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We agree with the General Counsel that it would have been preferable for the judge to explicitly discredit the employee testimony regarding the statements allegedly made by Plant Manager Rikard, or to explicitly credit Rikard's denial. Nevertheless, the judge did not err in holding that, because either version was just as believable, the General Counsel failed to carry his burden of proving the allegation that the statements violated Sec. 8(a)(1). *See Bethel Home, Inc.*, 275 NLRB 154, 157 (1985).

exists, in whole or in part, for the purpose of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Board has explained that "dealing with" contemplates "a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management." *Electromation, Inc.*, 309 NLRB 990, 995 fn. 21 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). The bilateral mechanism thus ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to these proposals by acceptance or rejection by word or deed. *E. I. du Pont & Co.*, 311 NLRB 893, 894 (1993). The record evidence establishes that this is precisely how the Respondent designed the Plant Council to operate.

Robert Sibilsky, the Respondent's vice president for operations who ordered the establishment of the Plant Council, testified that the Plant Council was designed to offer recommendations to management about proposed changes in working conditions and that management would consider whether to accept or reject those recommendations. Sibilsky testified:

> What you're looking for out of those bodies and specifically out of the Plant Council, is a consensus building type of recommendation that would come—that would be a recommendation from that entire committee to Management about a proposed change . . . and if there was a recommendations to be made, it was to be considered by Management.

Sibilsky testified, for example, that by written memorandum dated November 15, 1991, the Plant Council requested reconsideration of the Respondent's policy for issuing employee vacation paychecks. Sibilsky stated that Respondent's management considered the proposal, but

rejected it and decided to retain its procedures.[3] In addition, Matthew Newcomb, an employee member of the Plant Council, testified that the Plant Council proposed to management a policy that the Respondent would pay for employee safety shoes, and that the Respondent's management considered and approved the proposal.[4]

Indeed, Sibilsky was specifically asked by counsel for the General Counsel whether the Plant Council had the authority to make a final determination, without management approval, as to whether any policy recommendation was to be effectuated. Sibilsky replied:

> [O]f substantive nature, no . . . the area that they . . . cannot make decisions on are those that deal with—

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[3] The following exchange took place between Sibilsky and counsel for the Respondent:

> Q: There was previous testimony that I think the Plant council or the steering committee . . . got involved with an issue cutting checks . . . for employees when they go on vacation. Do you have any direct information on that subject.
>
> A: The vacation pay issue was addressed at the plant council.
>
> Q: Okay.
>
> A: And it came to me as a question.
>
> There were a couple of issues that were raised. One, employees were asking why we had to deduct federal taxes, state taxes, from their vacation check. They didn't want that to take place. *Could we change what we did? And not do that?*
>
> The second question was, the employees normally received their vacation pay check on their anniversary date. *They wanted to change that to when they took their vacation, could they get their vacation check, I responded in writing to the plant council . . . that we could not change the methodology of how we distributed the vacation checks. And so we stayed with the program. It was not changed.* [Emphasis added.]

[4] Newcomb testified:

> Q: And tell us, as much as you remember, about what's been discussed in the Plant Council meetings.
>
> A: . . . And safety shoes, we [the Plant Council] come up with a policy for safety shoes. *The company agreed* to give forty five dollars for everybody buying a pair of OSHA, approved safety shoes. . . . [Emphasis added.]

> with the handbook—those issues related to wages, hours, that sort of thing. They don't have the authority to make that decision.

Sibilsky emphasized that management would treat recommendations on such issues from the Plant Council "very seriously," and that management would "have to take it under advisement." [5]

We accordingly conclude that the record evidence establishes that the Plant Council existed for the purpose, at least in part, of following a pattern or practice of making proposals to management which would be considered and accepted or rejected, and that such a pattern in fact occurred.[6] We therefore agree with the judge that the element of "dealing with" is present in this case.[7]

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[5] We note that on advice of counsel the Respondent temporarily restricted during the pendency of the instant proceeding the Plant Council procedure of recommending proposals to management.

[6] The judge additionally found, and we agree, that the Plant Council acted in a representational capacity because its employee-members were elected by the Respondent's work force. *Compare NLRB v. Scott & Fetzer Co.*, 691 F.2d 288, 294-295 (6th Cir. 1982) (continuous rotation of employee committee members rather than an electoral process militates against finding labor organization status). We note further that the Plant Council canvassed employees for their opinion regarding policy changes the Plant Council was considering. For example, the Plant Council circulated to all employees a copy of its proposed attendances program, asking employees to read the proposal and respond back to the Plant Council, and attaching a comment form. The Plant Council minutes additionally reflect its efforts in "trying to get the feeling of what the employees actually wanted on vacation checks."

In light of our finding that the Plant Council acted in a representational capacity, it is unnecessary to the disposition of this case to determine whether an employee group could be found to constitute a labor organization absent a finding that it acted as a representative of other employees. See *Electromation*, supra, 309 NLRB at 994 fn. 20.

[7] We thus find that the record evidence contradicts the Respondent's contention in its exceptions that the Plant Council was merely a unilateral employee communication device and brainstorming

2. We further agree with the judge that the Respondent unlawfully dominated the formation and administration of the Plant Council. A labor organization that is the creation of management, whose structure and function are essentially determined by management, and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2) of the Act. *Electromation*, supra, 309 NLRB at 995. Each of these elements is present in this case.

The record evidence establishes that the Plant Council was the creation of management. By memorandum dated February 11, 1991, Vice President Sibilsky directed Olin Rikard, Respondent's director of manufacturing, to establish the Plant Council and to have it in place by March 15, 1991. Two days later, a memorandum from Mark Blackburn, Respondent's plant superintendent, was posted to all employees directing the establishment of the Plant Council, describing the goals for the Plant Council, and detailing the election process.

The record evidence further establishes that the structure and function of the Plant Council were essentially determined by the Respondent. Sibilsky directed in his memorandum of February 11, 1991, that "[t]he Plant Council will consist of five hourly employees who will be elected by the hourly work force," and that "the Plant Council will function as a policy development body . . . involved with the development of plant policies, the employee handbooks, the creation of a grievance procedure that will involve council member representation, and with the process of hourly compensation and benefits." The Respondent further determined the number of manage-

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group. Compare *E. I. du Pont & Co.*, supra at 894 (committee that exists for the purpose of sharing information with the employer, or engaging in brainstorming without making specific proposals, is not a statutory labor organization).

ment officials who would serve on the Plant Council, and selected those individuals. Thus, the Respondent determined the function of the Plant Council, defined the subject matter to be addressed by the Plant Council, and announced the number of employee and management representatives that would serve on the Plant Council.[8]

The record evidence further unequivocally establishes that the existence of the Plant Council depended entirely on the authorization and approval of the Respondent. Although the Respondent contends in its exceptions that the Respondent's employees had expressed an interest in a plant council in 1989, it is undisputed that the Plant Council was not in fact initiated by the employees but by Sibilsky's management directive. Sibilsky testified that *he* decided in late January 1991 to implement the Plant Council because of problems he perceived in the operation of the Employee Involvement Steering Committee, which had been established to focus on issues of quality, waste reduction, housekeeping, safety, and productivity but was then being asked by employees to involve itself with "policy" issues.[9] It was Sibilsky, moreover, who ordered the establishment of the Plant Council to be halted following the February 22, 1991, election based on his judgment that there was insufficient support for the Plant Council. And it was the Respondent that reestablished the Plant Council by directing in late April or early May 1991 that a second election for Plant Council be con-

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[8] We have carefully considered the Respondent's exceptions stating that the Plant Council created its own bylaws, and that the Employee involvement Steering Committee had some involvement in the election process for Plant Council representatives. These facts are insufficient to outweigh the record evidence that the functions, structure, and composition of the Plant Council was determined by the Respondent.

[9] As the judge noted, the General Counsel has not alleged that the Respondent's establishment of the Employees involvement Steering Committee was unlawful.

ducted. Based on these facts, there can be no dispute that the Respondent has the authority to establish and disband the Plant Council entirely at its own discretion.

We accordingly agree with the judge's conclusion that the impetus behind the formation of the Plant Council emanated from the Respondent, and that the Plant Council has no effective existence independent of the Respondent's active involvement and approval. A finding of unlawful domination is accordingly warranted. *Electromation*, supra, 309 NLRB at 996.

We recognize that this case arises in the Sixth Circuit. As the Respondent notes, the Sixth Circuit has, on occasion, declined to enforce decisions of the Board finding that employer-sponsored committees violated Section 8(a)(2). See *NLRB v. Scott & Fetzer Co.*, supra; *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989). We believe, however, that the Sixth Circuit precedent upon which the Respondent relies is distinguishable.

In *Airstream*, the Sixth Circuit found that the employer's "President's Advisory Council" (PAC) was not a statutory labor organization because it did not deal with wages or rates of pay, did not involve itself in or purport to accomplish the settling of grievances and did not attempt to resolve labor disputes with individual employees.[10] In contrast, the Plant Council here was specifically assigned by the Respondent to develop policies concerning wages and benefits, work rules and hours of operation, and to create a grievance procedure involving Plant Council member representation. There can thus be no dispute that the Plant Council was charged with responsibility for those topics listed in Section 2(5) of the Act.

Further, in *Airstream*, the Sixth Circuit found that the PAC meetings were no different from prior "rap sessions"

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[10] 877 F.2d at 1285.

at which employees were invited to ask questions and make suggestions." [11] The Plant Council, in contrast, was not a forum for suggestions but was a formalized procedure designed to make specific recommendations to management about changes in wages, hours, and other conditions of work, and the Respondent pledged itself to consider whether to accept or reject each recommendation. The Plant Council was thus not merely a means of communication between management and employees in which ad hoc proposals were made and in which management might glean some ideas and even adopt them, as the Sixth Circuit viewed the employee committee in *Airstream*. Rather, the Plant Council was directed to engage in a pattern and practice of making recommendations for management consideration.[12]

Nor is this a case in which the employee committee discussed with management issues of production problems and plant efficiency. See *NLRB v. Associated Machines*, 219 F.2d 433, 435 (6th Cir. 1955). The record evidence clearly establishes that the Plant Council was not designed to address such issues. Rather, the Respondent had created its Employee Involvement Steering Committee, which is not alleged to be unlawful, to address issues of productivity, quality, and safety. Sibilsky testified, however, that employees nevertheless were addressing issues of wages, benefits, and work rules to the latter committee. Sibilsky decided to create the Plant Council specifically to deal with issues of wages and other topics listed in Section 2(5) of the Act.

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[11] Id.

[12] Compare *NLRB v. Scott & Fatzer Co.*, supra, 691 F.2d at 294 (Sixth Circuit held that employee committee that was part of a company plan to determine employee attitudes regarding working conditions and other problems for the company's self-enlightenment, rather than a method by which to pursue a course of dealings, was not a "labor organization"; and emphasized the distinction between communication of ideas and a course of dealings).

Conclusion

Accordingly, for all these reasons, we agree with the judge that the Plant Council was a labor organization dominated by the Respondent in violation of Section 8(a)(2) and (1) of the Act.[13]

REMEDY

The Unfair Labor Practice Proceeding

We agree with the judge's recommended remedy requiring the Respondent to disestablish the Plant Council. Disestablishment is the usual Board remedy whenever unlawful domination of a labor organization is found. E.g., *Keeler Brass Co.*, 317 NLRB 1110, 1114 (1995); *Electromation*, supra, 309 NLRB at 995 fn. 24 and 998.

In two decisions issued more than 50 years ago, the Supreme Court upheld the Board's authority to order disestablishment of "a company union so organized that it is incapable of functioning as a bargaining representative of employees." *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 270 (1938). See also *NLRB v. Newport News Shipbuilding Co.*, 308 U.S. 241 (1939). In *Pennsylvania Greyhound*, the Court emphasized that the Act "secure[s] to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing." *Pennsylvania Greyhound*,

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[13] Chairman Gould agrees with his colleagues that the Plant Council was a labor organization dominated by the Respondent in violation of Sec. 8(a)(2) and (1) of the Act. He notes that the control exercised by the Respondent over the Plant Council is such that the freedom of choice and independence of action open to employees is not strictly confined within parameters of the Respondent's making for the Plant Council to be a genuine expression of democracy in the workplace. *Keeler Brass Co.*, 317 NLRB 1110 (1995) (Chairman Gould's concurrence). Further, the Plant Council was created for the purpose of engaging in a pattern or practice of dealing with the Respondent on employment conditions.

supra at 267. Likewise in *Newport News*, the Court reasoned that once a labor organization has been unlawfully dominated by an employer, "disestablishment . . . may be the only effective way of wiping the slate clean and affording the employees an opportunity to start afresh in organizing for the adjustment of their relations with the employer." *Newport News*, supra at 250.

The Representation Proceeding

We further agree with the judge's recommended remedy setting aside the results of the representation election held on April 18, 1991, and directing that a second election be conducted.

It is undisputed that the Respondent emphasized the role of the Plant Council throughout the Union's organizational campaign in urging its employees to vote against the Union. Indeed, the Respondent guaranteed its employees during the organizational campaign that if the Union lost the election no changes in the policies set forth in its employee handbook would be made except through the Plant Council process.[14] The Respondent's campaign

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[14] The Respondent declared in its campaign literature:

If the Union *WINS* the election:

—All wages are subject to change.

—All benefits are subject to change.

—Policies, rules, etc. are subject to change.

There is *NO* guarantee that those items will be as good as they are now.

If the Union *LOSES* the election:

—As we stated prior to this Union organizing drive,
We, the owners of Webvor:

GUARANTEE:

—The employee handbook will not be changed unless it is changed through the Employee Involvement Plans Council process. (Emphasis added.)

literature additionally pronounced that Webcor had in fact "implemented [the] Plant Council." The Respondent further portrayed the election as a stark choice between retaining the Plant Council and employee involvement processes or selecting the Union as its representative.[15] Sibilsky further underscored the prominent role of the Plant Council during meetings the Respondent conducted with its employees during the organizational campaign in which he explained to employees "what was in place, where it was going, what it could do for them, what it couldn't do for them." The record evidence accordingly demonstrates that the Respondent emphasized the Plant Council process in the context of urging employees to vote against the Union throughout the critical period between the filing of the representation petition on February 19, 1991 and the election itself on April 18, 1991.

The Respondent nevertheless asserts that the Plant Council was not in fact implemented during the critical period and did not effect any changes in working conditions during the critical period. The Respondent accordingly contends that the Plant Council had only a de minimis impact on the representation election and does not warrant the conduct of a second election.

The Respondent's argument disregards the record evidence. As noted above, the Respondent specifically advised employees during the critical period that the Plant Council was in place. The Respondent does not dispute or even address the conspicuous role it ascribed to the

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[15] The Respondent's campaign literature stated:

> The choice you will make on [election] day is a simple one. EITHER . . .
>
> You will choose to hire Teamsters 8332 as the sole and exclusive agent.
>
> OR . . .
>
> You will choose to continue a relationship with Webcor based on Employee Involvement.

Plant Council during the critical period in its campaign against the Union. And the Respondent concedes, as it must, that it conducted an election for the Plant Council during the critical period on February 22, 1991.

The Respondent further guaranteed its employees during the critical period that the policies in the employee handbook would not be changed except through the Plant Council process if the Union lost the election. The Respondent's campaign literature concomitantly reminded employees that the handbook included policies of significance such as double time for Sunday work and utilizing holiday and vacation hours to compute overtime. The Employer's announcement of the Plant Council as a guarantor against change in policies of great import to employees contradicts the Respondent's contention that its actions, even if considered to be misconduct, were de minimis with respect to affecting the results of the election. The record evidence compels the conclusion that the role of the Plant Council was stressed by the Respondent throughout the critical period as a reason to vote against the Union. This case thus falls squarely within the Board's general policy of setting aside an election when an unfair labor practice occurs during the critical period. See, e.g., *Leather Center*, 312 NLRB 521, 530 (1993).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Webcor Packaging, Inc., Burton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees of the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Di-

rector shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Local 332, International Brotherhood of Teamsters, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be

grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. December 18, 1995

WILLIAM B. GOULD IV, Chairman

MARGARET A. BROWNING, Member

JOHN C. TRUESDALE, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

JD—221—93
Flint, MI

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

7—CA—31809
7—CA—31896
7—RC—19513

WEBCOR PACKAGING, INC.

and

LOCAL 332, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The General Counsel alleges that a Webcor supervisor threatened one employee because of the union activities of Webcor's workforce, coercively interrogated another employee, and gave the impression that Webcor was spying on the employees' union activities, all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). But the General Counsel's major allegation is that Webcor dominated and interfered with the formation and administration of a labor organization, and contributed financial

and other support to it, thereby violating Section 8(a)(2) of the Act.[1]

I turn first to the alleged violation of Section 8(a)(2).

Webcor's "Plant Council"

Webcor manufactures corrugated boxes. It operates only one facility, a plant in Burton, Michigan. Webcor's employees are not represented by a union.

Robert Sibilsky arrived at Webcor, as vice-president for operations, in September 1990. (Sibilsky is an owner of Webcor, apparently acquiring his ownership interest about the same time he became vice-president of the company.) Sibilsky had been the manager of another corrugated box manufacturing company, Consolidated Packaging, prior to coming to Webcor. According to Sibilsky's credible testimony, what Sibilsky calls "employee involvement" at Consolidated Packaging led to exceedingly high quality in that plant's output—levels of quality that were, in fact, higher than at Webcor. Sibilsky accordingly was an apostle of employee involvement when he began his management of Webcor.

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[1] The Charging Party, Local 332, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereafter Local 332 or the Union), filed its charge in Case 7—CA—31809 on April 25, 1991, and its charge in Case 7—CA—31896 on May 17, 1991. On June 7, 1991, the Regional Director for Region 7 issued an Order Consolidating Cases and a Notice of Consolidated Hearing. The Regional Director simultaneously ordered that the Union's Objections to the election held in Case No. 7—RC—19513, which to a considerable extent parallel the alleged unfair labor practices, be consolidated for hearing with the unfair labor practice allegations. I held the hearing herein in Flint, Michigan, on October 29 and 30, 1992. Thereafter the General Counsel and Webcor filed briefs. Webcor admits that it is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act and further admits that Local 332 is a labor organization within the meaning of Section 2(5) of the Act.

By "employee involvement" Sibilsky means a way of operating a plant: (1) that calls on employees, as well as management, to think up better ways of operating, primarily in respect to matters that affect productivity, quality, safety, plant cleanliness, and reduction in waste; (2) in which management proceeds in a manner that evidences a respect for what employees have to say about how things should be done in the plant; and (3) under which small numbers of employees and supervisors meet as committees in order to thrash out the best ways to improve operations and deal with problems as they crop up.

Sibilsky credibly testified that, as he sees things, unless managers of manufacturing operations do utilize employee involvement programs, competitive levels of quality and low cost cannot be achieved. In Sibilsky's words—

> What surfaced in the mid-80's was something that we really knew a long time ago . . . but we didn't utilize it—the way we were going to achieve . . . quality and low cost was by involving all the people in our operation in thinking. Not checking their brains at the door, but thinking about and participating in how we are going to get better at what we do. Because if we don't get better . . . we're not going to get any business. We will not be there. It is that simple.

Sibilsky found no employee involvement in the problem-solving process when he arrived at Webcor; what was in place, as Sibilsky testified, was a "top-down type of arrangement . . . . The solutions were always top down. [The employees] weren't asked for their input on solutions to . . . quality problems, productivity problems, or the rest of it." (Sibilsky defined "top-down management" this way: where the managers of a plant, rather than asking the employees how a problem can be solved, "take it upon themselves to analyze the problem, and determine what the issues are, and then force the solution down the pipe.")

Sibilsky, as vice-president of operations and an owner of Webcor, is senior to all other members of Webcor's management. The next most senior official at Webcor is director of manufacturing Olin Rikard. In Rikard's words, Sibilsky quickly "made it very clear that we [Webcor] were going to have employee involvement."

On November 1, 1990, Sibilsky became specific about what he wanted in the way of an employee involvement structure: he ordered Rikard to establish an "Employee Involvement Steering Committee." That Committee would have five members—three employees and two members of management. (The employee members would be chosen by lot from among those who volunteered to serve on the Committee.) The Committee was expected to focus on issues of quality, waste-reduction, housekeeping, safety and productivity. Those were the areas, thought Sibilsky, about which the employees could be expected to have expertise and where, as Sibilsky testified, "the bang for the buck" is. The Employee Involvement Steering Committee was not to involve itself in what Sibilsky calls "policy" issues; that is, matters such as wages, work rules, hours of employment, and the like.

The Employee Involvement Steering Committee was established in mid-December 1990, held its first meeting on January 3, 1991, and held meetings weekly thereafter. (Hereafter all dates to which this decision refers occurred in 1991 unless otherwise noted.) Webcor's employees promptly began to submit matters for consideration by the Committee. (The General Counsel does not allege that Webcor violated the Act in any respect by establishing the Employee Involvement Steering Committee.) But by mid-January it became clear that things were not going as Sibilsky had hoped. The problem was that many of the matters employees were asking the Employee Involvement Steering Committee to handle did not directly deal with productivity or quality or the like. Rather, they concerned policy issues. For example, suggestions coming into the

Employee Involvement Steering Committee had to do with changes in the way overtime was distributed among employees, whether employees should be on or off the clock during lunch breaks, when employees should receive their vacation pay, and whether and to what extent the company should reimburse employees for the cost of tools and safety boots.

Sibilsky, and a labor consultant from whom Sibilsky sought advice, had recognized that the Employee Involvement Steering Committee would inevitably receive some suggestions having to do with policy issues. But Sibilsky and the labor consultant agreed that the Employee Involvement Steering Committee should not deal with such matters. A separate entity would be set up to handle them. Sibilsky's expectation had been that the establishment of this other entity would be delayed until the Employee Involvement Steering Committee had been in operation for a while.

But when suggestions dealing with policy issues began arriving on the doorsteps of the Employee Involvement Steering Committee, some arrangement had to be made to deal with them by an entity other than the Employee Involvement Steering Committee. The problem was that that committee "was getting gridlocked on what [it] could and couldn't do" (in Sibilsky's words).

A complicating factor is that it was at this point—mid-January—that several employees asked Local 332 to run an organizing effort at Webcor. Until then, there had been no union activity at Webcor since an unsuccessful unionization campaign late 1989 by the Allied Industrial Workers. (Ironically, the employees' interest in union representation appears to have been aroused by changes in procedures at Webcor that Sibilsky had, without seeking employee input, forced "down the pipe"—to use Sibilsky's phrase.)

The result of all this was that in late January and early February Local 332 got ready to begin an organizing cam-

paign at Webcor; and, simultaneously, Sibilsky, after pondering what to do about providing for employee involvement in policy matters, moved toward the creation of a "Plant Council" that would deal only with such matters.

On February 11 Sibilsky ordered Rikard to establish a Plant Council in a memorandum that specified that the Plant Council would have "five hourly employee" members "who will be elected by the hourly work force" and enumerated the matters with which the Plant Council would "be involved."

By February 11 Sibilsky had begun hearing rumors about union activity in the plant. Thus the first question to consider is whether Sibilsky decided to establish the Plant Council, or decided to establish it so soon, because of the union activities of the employees.

My conclusion is that the employees' union activities affected neither the decision to establish a Plant Council nor the date on which the idea of a Plant Council was put before the employees. Considerable evidence adduced by Webcor shows that management's action regarding a Plant Council was driven by Sibilsky's views about the importance of employee involvement, by advice from a labor consultant concerning employee involvement (which advice was not based on information about union activity), and by the nature of the matters that the employees were asking the Employee Involvement Steering Committee to consider.

I note that the General Counsel contends that Local 332 handbilled at the plant on February 7—four days before Sibilsky's order to Rikard to establish a Plant Council. But I find that the evidence fails to show that there was any handbilling that early. (A business agent of the Union testified that he distributed handbills on February 7 and then again on February 16. But he had earlier testified that the Union did not do any handbilling until after the filing of the election petition, and that occurred on

February 19. Further, no one but the business agent testified that there was any overt union activity prior to the filing of the election petition.) In any event, my finding about the reasons for the establishment of the Plant Council would not change even if there had been handbilling on February 7.

On February 13, two days after Sibilsky ordered Rikard to establish a Plant Council, management announced to employees that there would be a meeting on February 15 to discuss the "Webcor Plant Council" and also announced that the five employee members of the Plant Council would be chosen by an election among the employees to be held a week later.

The Employee Involvement Steering Committee had been asked to design the procedures for choosing the employee membership on the Plant Council. The Committee decided that the employee members of the Plant Council should be chosen by election from among all the production and maintenance employees. Sach employee was to vote for five of the listed names.

The election was held as scheduled, on February 22. Twenty-eight employees cast ballots. But 18 of the 28 ballots were blank. Of the five employees receiving the most votes (on the 10 ballots that were not blank) four refused to serve on the Plant Council. An employee called as a witness by the General Counsel testified that, as far as he was concerned, the proposed establishment of a Plant Council was merely management's way of responding to Local 332's organizing effort. The employees' response to the election for membership on the Plant Council suggests, or course, that that feeling was widespread.

Sibilsky recognized that the election for Plant Council membership showed "that there wasn't any support" for the Plant Council. He accordingly ordered that everything concerning a Plant Council temporarily come to a halt.

Nonetheless, in a "Dear Employee" letter distributed on March 20, management contended that one reason Webcor's employees ought to vote against representation by the Union was management's commitment to "employee involvement"; and in listing management's accomplishments, the letter referred to "implemented Plant Council."

The representation election was held on April 18. Fourteen employees voted in favor of representation by Local 332; 21 employees voted against representation by the Union.[2]

About two weeks later—in late April or early May—management again conducted an election to choose the employee members of the Plant Council. As was the case in the earlier, abortive, election, management provided the ballots and the polling place, and the election was conducted during working hours, with the employees on the clock. On this occasion employees were asked to volunteer to serve on the Plant Council. The ballots named only the volunteers. The election was a success in that the employees cast complete ballots, five employee members were chosen from among those who volunteered, and those five employees agreed to serve.

The plant council began meeting in May and has continued to meet regularly since then.

Here are the details of what the Plant Council is and how it operates.

The Membership Of The Plant Council; The Decisional Process

The Plant Council has eight members: five employees (as already discussed) and three members of management.

[2] The bargaining unit: All full-time and regular part-time production and maintenance employees and truck drivers employed by Webcor at its facility at 1220 Center Road, Burton, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

The management members are the two most senior officials at the plant (the director of manufacturing and the plant manager), and a lower ranking Webcor official. If an employee member of the Plant Council is promoted into management, that individual leaves the Council and the employee who received the next highest vote at the previous election for Plant Council members replaces the departing individual.

Employees choose only the employee members of the Plant Council; they do not select the management members. It is not altogether clear whether there has been any decision concerning the term of an employee member on the Plant Council. But Sibilsky apparently planned that each employee member of the Plant Council would remain on the Council for a maximum of about a year.

An employee member of the Plant Council called as a witness by the General Counsel agreed that each member has an "equal say . . . in terms of the ability to bring topics up and discuss topics.' ' The chairmanship of the Plant Council rotates, so that a different member chairs each meeting. As a result, sometimes an employee member of the Plant Council chairs the meeting, sometimes a management member does.

In theory the members of the Plant Council can vote on an issue, with a simple majority determining the outcome. In practice the members strive to reach a consensus and, as of the hearing, have always succeeded. (The employee members of the Plant Council appear to be quite satisfied with the decisional process within the Plant Council. That holds true for an employee member of the Plant Council who had actively supported Local 332 during the 1991 election campaign.)

Employees who are not members of the Plant Council bring matters to the Plant Council's attention by placing a written suggestion in a box designated for that purpose. Management puts matters before the Plant Council by

having one of the management members raise it at a Plant Council meeting. The Plant Council routinely invites to Plant Council meetings those employees who have made suggestions so that the employees can orally present their proposals.

The Kinds Of Matters The Plant Council Is Authorized To Deal With

I mentioned earlier that action on a Plant Council was set in motion by a February 11 memorandum from Sibilsky to Rikard. In that memorandum Sibilsky spelled out the matters that he wanted the Plant Council to concern itself with:

> The Plant Council will be involved with the development of plant policies, the employee handbooks, the creation of a grievance procedure that will involve Council member representation, and with the process of hourly compensation and benefits.
>
> The Plant Council will function as a policy development body . . . .
>
> All matters of plant policy, procedure, and compensation will be jointly reviewed prior to implementation by the Plant Council and Management.

By way of example, Sibilsky testified, the Plant Council could consider work rules, wages and benefits, what the plant's hours should be, and what kinds of discipline should be meted out for specified infractions.

The Effect Of A Plant Council Decision

As touched on earlier, four individuals own Webcor and are considered Webcor's senior management. Decisions of the Plant Council ordinarily are not implemented unless approved by the owners. As Sibilsky put it, no Plant Council decision of a "substantive nature" is put into effect without such approval. The only decisions of

the Plant Council that are implemented without the owners' approval, testified Sibilsky, are decisions on "lesser issues"—decisions "that are logical to make at the level of the plant."

The Activities Of The Plant Council

Matters that have come before the Plant Council include:

Tools. The issue the Plant Council dealt with was when Webcor should purchase tools for an employee (for use in the employee's work in the plant) and when should the employee be responsible for the purchase of tools. Rikard and one of the employee members of the Plant Council drafted a policy statement on the subject, the Plant Council adopted it, and the policy was implemented.

Overtime equalization. Webcor's employees had been complaining about favoritism in the way overtime work was handed out. The members of the Plant Council decided that when there was overtime work to do, management would be required to first turn to the employee (in the relevant job classification) with the lowest number of overtime hours; the employee with the highest number of overtime hours would be asked last. Seniority was to be ignored for that purpose. This overtime equalization policy has been implemented.

Safety boots. Webcor had been paying for one pair of safety boots per year for some of its employees. The employee members of the Plant Council proposed that, due to the nature of the work involved, some of those employees needed two pair of safety boots per year and that Webcor should pay for both pair. The management members of the Plant Council agreed, and Webcor now does pay for two pair of safety boots per year for such employees.

Attendance policy. In April 1992 management proposed a revision to the plant's attendance rules. All of the

plant's employees were asked to consider the revision and to "respond back to the Plant Council." Within the Plant Council, the employee members opposed implementation of the new attendance rules. The new rules were not implemented. But the members of the Plant Council did reach agreement about some changes in attendance policy, and Webcor did implement those changes.

The implication of the record as a whole is that none of these actions would have been implemented unless Webcor's owners approved of the Plant Council's decision. But the record is not entirely clear in that respect.

Temporary Restrictions On Plant Council Activities

Webcor's labor counsel advised the company that the Plant Council should not act on matters directly affecting employee pay and benefits until the conclusion of this proceeding. The result of this advice has been that the Plant Council has considered, but not acted upon, the following matters: (1) changes in incentives for perfect attendance; (2) whether each employee ought to get a paid day off when a grandparent dies; and (3) the timing of the issuance of checks covering paid vacation time.

Sibilsky testified that, as a result of counsel's advice concerning the need to await the outcome of this proceeding, matters that might affect expenditures have been considered by the Plant Council, but they have not come out in the form of recommendations. That, however, overstates the restrictions on the Plant Council, given the new policies governing tools and safety shoes that have been implemented as a result of Plant Council action.

When Does The Plant Council Meet; Management Support

The Plant Council meets in the plant during working hours. The members of the Plant Council decided they would meet twice a month. The plant manager schedules

the meeting dates, subject to change at the request of any member of the Council.

Management supplies any needed materials and equipment. All members of the Plant Council are paid for the time they spend on Plant Council matters.

Does Webcor's Plant Council Violate Section 8(a)(2)

The question for consideration in this proceeding is not whether Webcor's Plant Council benefits Webcor's employees or harms them; or whether the Plant Council, and entities like it at other companies, would be good for America or bad. Rather, this case is about whether, in the words of Sections 2(5) and 8(a)(2) and in light of *Electromation, Inc.*, 309 NLRB No. 163 (Dec. 16, 1992), and its progeny, the Plant Council is a "labor organization," and whether, if it is, Webcor "dominate[d] or interfere[d] with the formation or administration" of the Plant Council "or contribute[d] financial or other support to it."

Is the Plant Council a "labor organization." Section 2(5) defines "labor organization" as follows:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

It is clear, of course, that Webcor's Plant Council is an "organization" within the meaning of Section 2(5), and is one in which "employees participate." See generally, *Electromation*, slip op. at 5. It is also clear that the Plant Council's purpose is to consider, and to take positions on, "grievances, . . . wages, rates of pay, hours of employment, or conditions of work." Further, it is inescapable that the Plant Council "deals with" an employer

concerning such matters. That is because, in respect to most matters the Plant Council follows a "pattern or practice" in which it, "over time, makes proposals to management" (with "management" in this case being Webcor's owners) and "management responds to these proposals by acceptance or rejection by word or deed." *E.I. Du Pont & Co.*, 311 NLRB No. 88, slip op. at 2 (May 28, 1993).[3]

What remains to determine is whether the employee members of the Plant Council "acted in a representational capacity within the meaning of Section 2(5)." *Electromation*, slip op. at 7;[4] see *General Foods Corp.*, 231 NLRB 1232, 1234 (1977).

Unlike *Electromation* (at fn. 7), the employee members of Webcor's Plant Council were not instructed to "to go amongst the other employees and find out what kind of ideas they had . . . ."[5] (Employees generally were invited to suggest matters for consideration by the Plant Council; however, I do not consider that to mean that the employee members of the Council acted in a representa-

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[3] As discussed earlier, in respect to a limited number of "lesser" matters the Plant Council's decisions result directly in changes in conditions of work. As to these matters it is unclear whether there is any "dealing" with employers. The criterion would appear to be whether the management members of the Council have the power to reject proposals put forward by the employee members. *Du Pont*, slip op. at 3. On theh one hand, it is the Plant Council's practice to operate by consensus—which suggests that the management members do have such veto power. Id. On the other hand, the Plant Council's rules provide for voting, in which case a simple majority determines the outcome. Since the management members are outnumbered by the employee members, in the case of a vote management could not reject a proposal supported by the employee members.

[4] But see id. at fn. 20.

[5] See also *Ryder Distribution Resources*, 311 NLRB No. 81, slip op. at 5 (May 28, 1993), in which the employee-members of the committee at issue were directed to poll the other employees concerning the various proposals discussed in committee meetings.

tive capacity.)[6] Rather, I got the impression that the employee members of the Plant Council voiced their own thoughts about how to deal with whatever issue was on the table, without concerning themselves about whether those thoughts necessarily mirrored the points of view of the plant's employees generally. And the testimony of employee Plant Council member Mathew Newcomb indicates that representation was not what the members of the Plant Council—either employee members or management members—had in mind: According to Newcomb, "we [the Plant Council members] are hoping to settle the problems and make the hourly employees and management see the same thing at the same level."

But for all that, the employee members of the Plant Council surely "represent" Webcor's employees generally. The point is that the employee members of the Plant Council are selected by election in which the voters are the plant's employees. Virtually by definition, the employee members of the Plant Council are thereby the representatives of the employees. That is, given their election to the Plant Council by the employees, the employee members of the Plant Council are "representatives" of the employees in that they "stand for . . . a class" (in the words of *Webster's Third International Dictionary*)—the class being Webcor's production and maintenance employees.[7]

I conclude, therefore, that Webcor's Plant Council is a labor organization within the meaning of Section 2(5) of the Act.

Domination and interference by Webcor. All this brings us to the question of whether Webcor "dominate[d] or

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[6] For other considerations regarding employee suggestion box procedures, see *Du Pont* at fn. 11 and accompanying text.

[7] Compare, for example, the "Communications Committee" in *Sears, Roebuck & Co.*, 274 NLRB 230, 244 (1985), in which "the employees on the committee were not selected by their fellow employees" but instead participated "on a rotion basis."

interfere[d] with the formation or administration" of the Plant Council and whether Webcor "contribute[d] financial or other support to it.

Webcor did all of that. The Plant Council was "the creation of management," its "structure and function" were "determined by management," and its "continued existence depends on the fiat of management." *Electromation*, slip op. at 6. Additionally the Plant Council's meetings are conducted on Webcor's premises,[8] Webcor pays the employees for the time they spend on Plant Council matters,[9] and Webcor contributes whatever additional slight financial support the Plant Council needs.

Webcor's motivation in establishing the Plant Council. The Plant Council was created because of Sibilsky's belief that Webcor would benefit by involving employees in the decisional processes. Concomitantly, Webcor's Plant Council was not created because of any antiunion animus on the part of Webcor's management. But "Sec. 8(a)(2) does not require a finding of antiunion animus or a specific motive to interfere with Sec. 7 rights." *Electromation* at fn. 24.

Webcor points out, on brief, that the Webcor "employees had expressed an interest in the formation of a Plant Council in 1989"—during the Allied Industrial Workers' organizational campaign. But that is beside the point if only because such expression of interest did not play a role in Sibilsky's decision to establish the Plant Council.

As for the indications in the record that Webcor's employees are pleased to have a Plant Council, that too is irrelevant to the question of Whether Webcor violated Section 8(a)(2). *Electromation* at fn. 24.

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[8] See, e.g., *Peninsula General Hospital Medical Center*, 312 NLRB No. 97, JD slip op. at 12 (Sept. 30, 1993).

[9] Id.

Webcor's Plant Council—Conclusion

Based on the foregoing findings and conclusions, I further conclude that Webcor violated Section 8(a)(2) of the Act.

The Alleged Violations of Section 8(a)(1)

Employee Mathew Newcomb testified that, soon after the Union had filed its election petition, plant manager Rikard told Newcomb that he (Rikard) had heard that Newcomb was one of the leaders of the unionization effort and asked Newcomb why he supported the Union. At the time Newcomb had not made public his position regarding the Union. The General Counsel claims that Webcor, by coercively interrogating an employee and giving an impression of surveillance of the employees' union activities, thereby violated Section 8(a)(1). Rikard, however, denied questioning Newcomb about Newcomb's role in or support for the Union, and Rikard's testimony was equally as credible as Newcomb's. The General Counsel, that is to say, failed to carry his burden of proof. I accordingly shall recommend that this allegation be dismissed.

Maintenance employee Ricky Middleton testified that, on the day preceding the representation election, Rikard said to Middleton, "I don't know what we're going to do with you if the Union is voted in." There had been widespread rumors in the plant that Webcor was going to reduce the number of employees in its maintenance department. If Rikard did utter such a statement, then, it constituted a threat that unionization might cost Middleton his job. But Rikard denied saying anything to Middleton about the Teamsters and denied threatening Middleton with job loss. Again, Rikard's testimony was equally as credible as Middleton's, and I shall therefore recommend that the allegation be dismissed.

Remedy

As requested by the General Counsel, the following recommended Order requires Webcor to disestablish the Plant Council. The General Counsel does not ask that I order Webcor to undo actions taken as a result of Plant Council recommendations. (As indicated earlier, Plant Council recommendations implemented by Webcor include, for example, rules covering payment by Webcor, in certain circumstances, of the costs of safety boots and tools.) And since it seems to me that more would be lost than gained by ordering such an undoing, the recommended Order imposes no such requirement.

There remains the question of whether the April 18, 1991, representation election should be set aside.

In that regard, one of the Union's objections states that:

> Since on or about February 19, 1991, the Employer has been trying to bargain with the employees to avoid having to go to an election with Teamsters Local 332.

While I have found that not to be the case, the objection does not put into issue the question of whether Webcor's actions regarding the Plant Council warrant setting aside the representation election. And since "the Board's general policy is to set aside an election whenever an unfair labor practice occurs during the critical period" (*Video Tape Co.*, 288 NLRB 636, fn. 2 (1989)), the only remaining question is whether any Webcor actions between February 19 (the day on which the petition was filed) and April 18 regarding the Plant Council violated the Act. That question arises because the Plant Council did not begin acting until May 1991 and its employee-members at that time had been selected by a vote that occurred after the representation election.

I have found that on February 22 (i.e., subsequent to the filing of the election petition), an election was held in

the Webcor plant to select the employee members of the Plant Council. It is true that, because of employee resistance, Webcor set aside the results of that election. But the act of holding the February 22 election would itself appear to constitute interference with the formation of a labor organization and thus be a violation of Section 8(a)(2). Moreover Webcor's management contended during the Union's campaign—as an argument against unionization—that the Plant Council had been "implemented"; that is, that the Plant Council existed. (Presumably Webcor's theory at the time was that the Plant Council, while for the moment inactive, would begin operating as soon as its membership was selected.)

The recommended Order accordingly sets aside the representation election held on April 18, 1991, and remands Case 7—RC—19513 to the Regional Director for Region 7 for the purpose of conducting a new election.

ORDER [10]

The Respondent, Webcor Packaging, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) dominating, assisting, or otherwise supporting the Plant Council.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[10] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Immediately disestablish the Plant Council.

(b) Post at its facility in Burton, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.[11]

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held in Case 7—RC—19513 on April 18, 1993, be set aside and the case remanded to the Regional Director for Region 7 for the purpose of conducting a new election.

Dated, Washington, D.C. October 28, 1993

/s/ Stephen J. Gross
STEPHEN J. GROSS
Administrative Law Judge

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[11] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Supreme Court, U.S.
FILED
JAN 7 1998
CLERK

(2)

No. 97-777

In the Supreme Court of the United States

OCTOBER TERM, 1997

WEBCOR PACKAGING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. 158(a)(2), by dominating and interfering with the formation and administration of a labor organization and contributing financial and other support to it.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 118 F.3d 1115. The decision and order of the National Labor Relations Board (Pet. App. 19a-33a) and the decision of the administrative law judge (Pet. App. 34a-53a) are reported at 319 N.L.R.B. 1203.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. The time for filing a petition for a writ of certiorari was extended to and including November 8, 1997, and the petition was filed on November 7, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a manufacturer of corrugated boxes in Burton, Michigan. Pet. App. 35a. In 1991, petitioner's vice president for operations, Robert Sibilsky, decided to establish an organization through which employees could recommend changes in their working conditions. *Id.* at 21a. By memorandum dated February 11, 1991, Sibilsky directed the formation of a Plant Council, with five members to be elected by the hourly work force. *Id.* at 24a, 39a. The memorandum further stated that the Plant Council "will function as a policy development body . . . involved with the development of plant policies, the employee handbooks, the creation of a grievance procedure that will involve council member representation, and with the process of hourly compensation and benefits." *Id.* at 24a.

On February 13, 1991, petitioner posted a memorandum to all employees announcing the establishment of the Plant Council, describing its goals, and detailing the election process. Pet. App. 24a, 40a. On February 22, 1991, petitioner held the election for the employee members of the Plant Council. Of the 28 ballots cast, 18 were blank. Also, four of the five employees elected refused to serve on the Plant Council. Sibilsky thereafter ordered a temporary halt to the Plant Council's establishment. *Id.* at 2a.

In the meantime, on February 19, 1991, the Union (Local 332, International Brotherhood of Teamsters, AFL-CIO) filed a petition with a regional office of the National Labor Relations Board (the Board) to represent a unit of petitioner's employees. Pet. App. 2a, 35a

n.1, 38a-39a. During the ensuing election campaign, petitioner urged employees to vote against the Union, and emphasized the benefits to be provided by the Plant Council. *Id.* at 2a-3a. Petitioner also claimed that it had already implemented the Plant Council in response to employee concerns. *Id.* at 2a-3a & n.1, 30a, 41a. On April 18, 1991, the employees voted against unionization by a vote of 21 to 14. *Id.* at 3a, 41a.

Two weeks later, petitioner again conducted an election for the employee members of the Plant Council. Pet. App. 3a. As before, petitioner provided the ballots and the polling place, and held the election during working hours. *Id.* at 41a. This time, employees were asked to volunteer to serve on the Plant Council and the ballots named only the volunteers. *Id.* at 3a, 41a. Five employees were elected and they, together with three management members named by petitioner, comprised the Plant Council. *Id.* at 3a. Meetings of the Plant Council began in May 1991 and continued thereafter. *Id.* at 41a. The meetings were held in the plant during working hours and were scheduled by petitioner's plant manager, subject to change at the request of a member. *Id.* at 3a, 45a-46a. Petitioner supplied the needed materials and equipment, and paid for the time that members devoted to the Plant Council. *Id.* at 3a, 46a.

In practice, the Plant Council decided issues by consensus, rather than majority vote. Pet. App. 3a, 42a. Employees who were not members of the Plant Council raised issues by putting suggestions in a box designated for that purpose. Those who made suggestions were routinely invited to Plant Council meetings to present their proposals orally. *Id.* at 3a, 42a-43a. Petitioner placed matters before the Plant Coun-

cil by having one of the management members raise the issue at a Plant Council meeting. *Id.* at 42a-43a.

The Plant Council was authorized to consider all matters concerning wages, hours, benefits, and work rules. Pet. App. 3a, 27a, 43a. In considering such issues, the Plant Council canvassed employees for their opinions concerning contemplated policy changes. *Id.* at 23a n.6, 44a-45a. Among the issues the Plant Council considered were petitioner's purchase of employee tools and safety boots, fair distribution of overtime, new attendance rules, and petitioner's policy on vacation paychecks. *Id.* at 10a n.6, 21a-22a, 44a-45a. The Plant Council proposed changes regarding those issues, and petitioner implemented the proposed changes except for the one pertaining to vacation paychecks. *Id.* at 21a-22a & nn.3-4, 44a.

2. On April 25 and May 17, 1991, the Union filed unfair labor practice charges against petitioner. Pet. App. 35a n.1. The Union alleged that the Plant Council is a labor organization under Section 2(5) of the National Labor Relations Act, which defines a labor organization to include "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152(5). The Union further alleged that petitioner dominated or interfered with the Plant Council's formation or administration, and contributed financial or other support to it, in

violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2).[1]

Following a consolidated hearing, an administrative law judge (ALJ) concluded that the Plant Council is a "labor organization" under Section 2(5) of the Act. Pet. App. 46a-48a. The ALJ found that the Plant Council is an organization in which employees participate; that the Plant Council deals with petitioner concerning grievances and the terms and conditions of work; and that the employee members of the Plant Council represent petitioner's employees. *Ibid.* Because petitioner dominated and interfered in the Plant Council's formation and administration, and contributed financial support to it, the ALJ further concluded that petitioner violated Section 8(a)(2) of the Act. *Id.* at 48a-49a.

3. The Board affirmed the ALJ's findings. Pet. App. 19a-33a. The Board first concluded that the Plant Council meets the statutory criteria of a labor organization under Section 2(5). *Id.* at 20a-23a. The Board reasoned that petitioner designed the Plant Council to "deal[] with" petitioner concerning employee grievances, and terms and conditions of work. *Id.* at 21a. The Board relied on Sibilsky's testimony that he formed the Plant Council to offer recommendations to petitioner about proposed changes in working conditions that petitioner either would accept or reject, and on the fact that the Plant Council functioned as intended. *Id.* at 21a-23a.

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[1] Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. 158(a)(2).

The Board also found that "the Plant Council acted in a representational capacity because its employee-members were elected by [petitioner's] work force." Pet. App. 23a n.6. The Board further explained that "the Plant Council canvassed employees for their opinion regarding policy changes the Plant Council was considering," and otherwise sought to ascertain employee sentiment on issues before the Council. *Ibid.* Because it found that the Plant Council represented petitioner's employees, the Board found it "unnecessary * * * to determine whether an employee group could be found to constitute a labor organization absent a finding that it acted as a representative of other employees." *Ibid.*

The Board further agreed with the ALJ that petitioner violated Section 8(a)(2) by dominating the formation and administration of the Plant Council. Pet. App. 24a-26a. The Board explained that petitioner determined the structure and administration of the Plant Council, and brought about its creation, abatement, and reestablishment. *Ibid.* Finally, the Board adopted the ALJ's recommended order setting aside the April 18, 1991 representation election and directing petitioner to disestablish the Plant Council. *Id.* at 28a-31a.

4. The court of appeals affirmed. Pet. App. 1a-18a. The court rejected petitioner's contention that the Plant Council is not a labor organization under Section 2(5) because the Council does not represent other employees. The court declined to address whether employee representation is a necessary element of a labor organization under Section 2(5). *Id.* at 8a. Instead, the court held that "there is ample evidence supporting the ALJ's finding that the Council oper-

ated at least in part as a representative body, rather than a brainstorming group." *Id.* at 9a.

The court also found that the Plant Council has been "dealing with" petitioner within the meaning of Section 2(5) of the Act. Pet. App. 9a-11a. The court explained that the Board has defined "dealing with" as "ordinarily entail[ing] a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required." *Id.* at 9a (quoting *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993)). Observing that the Board's definition of "dealing with" is reasonable and not challenged by petitioner, the court held that "the ALJ's findings make it plain that the Council was created to, and did, deal with the employer." *Id.* at 10a. The court also rejected petitioner's argument that the Council is not a labor organization because petitioner did not form the Council "out of hostility towards the union." *Id.* at 11a. The court concluded that "bad faith is not a prerequisite to a finding that a company-sponsored group is a labor organization." *Id.* at 12a.[2]

ARGUMENT

1. a. Petitioner renews (Pet. 10-11) its contention that the Plant Council did not represent petitioner's employees. That fact-bound question does not warrant this Court's review. See *NLRB* v. *Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8

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[2] The court of appeals also held that it had no jurisdiction to hear petitioner's challenge to the Board's remedy ordering that the April 18, 1991 representation election be set aside and that a new election be held. Pet. App. 17a. Petitioner does not challenge that holding in this Court.

(1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the court of appeals correctly concluded that substantial evidence supports the Board's finding that the Plant Council represented petitioner's employees. As the court below found, the ALJ reasonably concluded that the elected status of the Council's employee members "showed that they served at least in part as representatives," because generally "people vote for particular delegates because they hope that the person they elect will represent their views." Pet. App. 8a. Contrary to petitioner's assertion (Pet. 10), the Board's finding of representational status rested on other evidence as well. The court of appeals explained that a proposed new attendance policy had been circulated to all employees with instruction that they "respond back to the Plant Council" and, therefore, the Board could "infer[] that the Council was meant to represent those employees who did respond." Pet. App. 8a. The court further pointed to evidence from the minutes of Plant Council meetings suggesting "that the worker-members served to represent the whole class of employees." *Ibid.*[3]

b. Petitioner also contends (Pet. 8-11) that review by this Court is needed to resolve the question whether an employee group must act in a representative capacity in order to be a labor organization under

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[3] The court of appeals also reasoned that the fact that employees initially made written suggestions to the Council supported the Board's conclusion that employee members would represent their co-workers (Pet. App. 8a), and that, "if the Council was meant to get input from lots of individual employee members, it is hard to see why members were elected for such long (one-year) terms" (*id.* at 9a).

Section 2(5) of the Act. The court of appeals, however, did not reach that issue, because it found, like the Board, that the Plant Council operated in a representative capacity. Pet. App. 8a-9a, 23a n.6. Accordingly, the decision below does not present the question whether representative status is a prerequisite for a labor organization under Section 2(5).

2. Petitioner further argues (Pet. 12-15) that the Board has given the term "dealing with" under Section 2(5) an unreasonable interpretation. That claim lacks merit.

In *NLRB* v. *Cabot Carbon Co.*, 360 U.S. 203 (1959), this Court held that "Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should be limited to and mean only 'bargaining with.'" *Id.* at 211. The Board subsequently has explained that "dealing with" contemplates a "bilateral mechanism" that "ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management," concerning the subjects listed in Section 2(5), and management responds to those proposals "by acceptance or rejection by word or deed." Pet. App. 21a (citing *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n.21 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994)).

Petitioner asserts (Pet. 13) that the Board's definition makes it impossible for "employee involvement programs [to] exist in this country." That is not correct. Employers are free to communicate with their employees through means other than unlawfully dominating and assisting their labor organizations. Indeed, the Board has emphasized that:

> [I]f there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.
>
> . . .
>
> [I]f the committee exists for the purpose of sharing information with the employer, the committee would not ordinarily be a labor organization. That is, if the committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information, the element of dealing is missing, and the committee would not be a labor organization.

Pet. App. 9a-10a (quoting *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894); see also *Electromation, Inc.* v. *NLRB*, 35 F.3d 1148, 1157 (7th Cir. 1994) (noting "the lawful use of legitimate employee participation organizations, especially those which are independent, which do not function in a representational capacity, and which focus solely on increasing company productivity, efficiency, and quality control, in appropriate settings"). The court of appeals therefore correctly concluded that it should defer to the Board's reasonable interpretation of the term "dealing with." Pet. App. 9a-10a; see also *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 180-181 (1962) (recognizing deference owed to NLRB in defining meaning of a labor organization under Section 2(5)).

In the present case, the Board specifically found that the Plant Council is not "merely a means of com-

munication between management and employees in which ad hoc proposals were made and in which management might glean some ideas and even adopt them." Pet. App. 27a. Nor, contrary to petitioner's suggestion (Pet. 13-15), is the Plant Council a committee formed simply to discuss such issues as safety, employee productivity, and plant efficiency. Pet. App. 27a.[4] As the court of appeals explained, the Council "made several specific suggestions to the company" regarding terms and conditions of employment, and "the company responded by voluntarily adopting at least four of these." *Id.* at 10a. The court of appeals thus correctly concluded that "[t]his is a paradigm case of dealing." *Ibid.*

3. Petitioner finally argues (Pet. 15-17) that an employer may not be found to dominate or interfere with a labor organization unless the employer's actions are motivated by an intent to discourage employees from organizing for purposes of collective bargaining. The court of appeals properly rejected that contention. Pet. App. 12a. Nothing in the text of Section 2(5) or Section 8(a)(2) of the Act supports the view that the employer must be motivated by anti-union sentiment. Moreover, this Court in *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 248, 251 (1939), held that the Board could conclude that an employer unlawfully dominated and interfered with an employee committee, notwithstanding the employer's "good motives" or the fact that the employer did not attempt to interfere with

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[4] The Board explained that petitioner had created a separate Employment Involvement Steering Committee, which was not challenged by the Union, "to address issues of productivity, quality, and safety." Pet. App. 27a.

union activities. Accordingly, the court of appeals correctly held (Pet. App. 12a) that an employer's improper motive is not a requirement for finding unlawful domination or interference under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-777

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WEBCOR PACKAGING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE LABOR POLICY ASSOCIATION AND MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893 (1993) 14, 15
Electromation, Inc., 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994) ..... *passim*
Electromation v. NLRB, 35 F.3d 1148 (7th Cir. 1994) 3
General Foods, 232 N.L.R.B. 1232 (1977) 12
NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959) 10, 14
NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241 (1939) 11, 17, 18
NLRB v. Town & Country Electric, 516 U.S. 85 (1995) 3
Pierce v. Underwood, 487 U.S. 552 (1988) 20

Statutes

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* 2, 3
29 U.S.C. § 158(a)(2) 3, 10, 11, 12, 17
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Bills and Legislative History

79 Cong. Rec. 7650 (1935), reprinted in, 1 N.L.R.B., Legislative History of the N.L.R.A. (1959) 17
142 Cong. Rec. S7487 (daily ed. July 9, 1996) 20
142 Cong. Rec. S7615 (daily ed. July 10, 1996) 20
142 Cong. Rec. S7618 (daily ed. July 10, 1996) 5
H.R. Rep. No. 104-248 (1995) 5, 19, 20
S. Rep. No. 105-12 (1997) 19, 20
Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1995) 19
Teamwork for Employees and Managers Act of 1997, S. 295, 105th Cong. (1997) 19

Miscellaneous

Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. Corp. L. 657 (1996) 8

TABLE OF AUTHORITIES—Continued

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Jon Blumenthal, *Remedying Electromation, Inc. v. NLRB and its Progeny: The Future of Employee Participation Programs*, 5 Kan. J.L. & Pub. Pol'y 193 (1996) 8

Shaun G. Clark, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 Yale L.J. 2021 (1987) 9

A.B. Cochran, III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 Berkeley J. on Employment & Lab. J. 458 (1995) 3

Samuel Estreicher, *Employee Involvement and the Company Union Prohibition: The Case For Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125 (1994) 9

Rafael Gely, *Whose Team are You On? My Team or My Team?* 49 Rutgers L. Rev. 323 (1997) 8

William G. Gould, IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 Creighton L. Rev. 3 (1996) 8

John W. Kendrick, Policy Implications of the Slowdown in U.S. Productivity Growth, *reprinted in*, Productivity Growth and the Competitiveness of the American Economy (Stanley W. Black ed., 1989) 6

Nancy K. Kubasek, Wetley J. Hiers, Shannon T. Browne & Carrie Williamson, *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the* NLRA, 34 Harv. J. on Legis. 53 (1997) 8

John S. Lapham, *Enhancing Employee Productivity After Electromation and Dupont*, 45 J. of Urban and Contemporary L. 255 (1994) 9

Michael LeRoy, *"Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromation*, 73 Notre Dame L. Rev. 31 (1997) 12, 18

TABLE OF AUTHORITIES—Continued

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Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 Notre Dame L. Rev. 216 (1996)	8
Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 Geo. Wash. L. Rev. 1812 (1993)	9
Steven I. Locke, Note, *Keeping Sections 2(5) and 8(a)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees Through Electromation, Inc.*, 10 Hofstra Lab. L.J. 375 (1992)	9
Robert B. Moberly, *The Worker Participation Conundrum, Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 Wash. L. Rev. 331 (1994)	9
Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation and the Specter of the Company Union*, 68 N.Y.U. L. Rev. 1127 (1993)	9
Jerry L. McAdams & Elizabeth J. Hawk, Capitalizing on Human Assets (1992)	7
Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662 (1983)	9
Note, *Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 Harv. L. Rev. 678, 685 (1994)	9
Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. Cin. L. Rev. 1379 (1995)	9
Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DePaul Bus. L.J. 159 (1996)	8

TABLE OF AUTHORITIES—Continued

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Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 U.C.L.A. L. Rev. 571 (1992) 9

Madelyn C. Squire, *Electromation: A Metaphor for the Ills of the NLRA—Is a Representation Standard a Cure?*, 73 U. Det. Mercy L. Rev. 209 (1996) 8

Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 Yale L.J. (1993).. 9

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BRIEF OF THE LABOR POLICY ASSOCIATION AND MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Labor Policy Association and the Manufacturers Alliance for Productivity and Innovation respectfully submit this brief *amici curiae* with the consent of all parties.* The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICI CURIAE*

The Labor Policy Association (LPA) is an organization of the senior human resources officers of over 250

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* Counsel for *amici curiae* Labor Policy Association (LPA) and Manufacturers Alliance for Productivity and Innovation (the Alliance) authored this brief in its entirety. No person or entity, other than LPA and the Alliance, made a monetary contribution to the preparation or submission of the brief.

of the nation's largest private sector employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

Manufacturers Alliance for Productivity and Innovation (the Alliance) is a nonprofit research organization supported by some 500 manufacturing companies from a broad range of industries. These members range in size from relatively small, single product manufacturers to very large, highly diversified companies with annual sales revenues exceeding $1 billion. Roughly one-quarter of the Fortune Magazine 500 largest U.S. industrial companies are members of the Alliance, and almost every firm in the large manufacturer sector that has won the prestigious Malcolm Baldrige National Quality Award is an Alliance member. Alliance companies are on the leading edge of the rapid changes in U.S. industry that are central to the nation's trade, competitiveness, and standard of living. Employee involvement—the issue in this case—is a key component in the total quality management movement in the United States. The Alliance maintains a standing council, comprised of executives from its member companies who are responsible for corporate or major unit quality improvement, devoted to such quality issues.

The members of LPA and the Alliance all are employers subject to the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and virtually all have established employee involvement or participation structures in order to increase productivity by involving employees in the critical decisionmaking of the enterprise and, ultimately, to keep the company competitive in today's global marketplace. As a result, LPA and the Alliance are deeply concerned about the decision below, in which the court enforced a National Labor Relations Board order requir-

ing the disestablishment of one such employee involvement structure.

Because of their interest in the development of the nation's labor laws, both LPA and the Alliance have participated as *amicus curiae* in cases before this Court, the United States Courts of Appeals, and the National Labor Relations Board. *E.g. NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).

Thus, LPA and the Alliance have an interest in, and familiarity with, the issues and policy concerns presented in this case. Indeed, because of their experience, *amici* are well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The facts of the case are set out fully in the Petition for Certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This Petition involves an issue of vital national concern: the extent to which employees lawfully may participate in the management and critical decisionmaking of their companies under the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.*

Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization . . . ." The Act further provides that the term "labor organization" includes:

> any organization of any kind, or any agency or employee representation committee or plan, in which

> employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5).

Although these provisions originally were drafted to prohibit "company" or "sham" unions—*i.e.* those established by employers to supplant legitimate unionization—rulings by the National Labor Relations Board (NLRB or the Board) and the lower federal courts have made it increasingly unclear as to what extent these statutory provisions prohibit modern "employee involvement" or "employee participation" structures.

The importance of this issue can scarcely be overstated. It is estimated that nearly 30,000 U.S. businesses have established employee involvement structures in some form, a number comprising 75% of all American business including 96% of all large companies. Moreover, it is now generally accepted that employee involvement is a critical if not essential element for success in today's global marketplace. Indeed, the issue is so important to the national economy that few questions of federal labor law have generated as much scholarly interest and concern as the legality of employee involvement.

Unfortunately, despite the importance of the question, this Court has not yet had the opportunity to address the issue fully. More unfortunately, the attempts by the NLRB and the lower courts to resolve the issue have utterly failed. Specifically, the Board has failed to provide meaningful and rational guidance regarding the extent to which employee involvement structures constitute statutory labor organizations; has refused to address whether organizations must act in a representational capacity for the employees in order to constitute labor organizations; and, has erroneously disregarded employer motive and employee perceptions in determining whether an employer has unlawfully dominated a labor organization.

Because the NLRB and lower courts have failed to articulate a rational policy that is consistent with the NLRA with respect to the legality of employee involvement, and because of the national importance of the issue, this Court should review this case. Moreover, although these issues recently have seen significant debate in the public policy arena, the issues presented in this Petition nonetheless are questions of *existing federal law* that properly are before the Court.

REASONS FOR GRANTING THE WRIT

I. THE EXTENT TO WHICH EMPLOYEE INVOLVEMENT STRUCTURES CONSTITUTE LABOR ORGANIZATIONS WITHIN THE MEANING OF SECTION 2(5) OF THE NLRA IS AN ISSUE OF VITAL NATIONAL CONCERN THAT SHOULD BE DEFINITIVELY RESOLVED BY THIS COURT

A. The Extent to Which Employee Involvement Structures Constitute Statutory Labor Organizations Is a Question of Vital National Concern

This case involves a question of federal labor law that is of vital national interest and concern—the extent to which employee "involvement" or "participation" structures constitute labor organizations under the NLRA.

The magnitude of this issue is simply enormous. Today, involving employees in the management of the company is well-recognized as an important, if not essential, means of keeping companies competitive in the global economy. An estimated "30,000 companies now have these joint, cooperative programs in workplaces across the country. They cover 75% of all employers, and 96% of the Nation's biggest employers." 142 Cong. Rec. S7618 (daily ed. July 10, 1996) (Statement of Senator Kennedy). *See also* H.R. Rep. No. 104-248, at 10 (1995).

The raw numbers do not tell the whole story, however, and the qualitative value of the structures at issue in this

case also is indicative of their importance. During the past thirty years, American management philosophy and practice has changed dramatically. Increasingly open world markets and technological developments in communication and transportation have made the world smaller. Consequently, American companies have been forced to participate in a global marketplace that will not tolerate inefficiency.

In order to compete in this new marketplace, corporations have had to adapt and change. In many cases, employers have had to adopt elements of the successful management strategies of their foreign competitors. A principal aspect of this metamorphosis has been the abandonment of the traditional, top-down, dictatorial style of management that pervaded American companies during the first three-quarters of this century. In its place, employers have increasingly sought to involve their workers in the management process through the use of employee involvement structures or teams.

> Over the past decade, there has been a major shift in management philosophy and practice in many firms and other organizations form the old "Theory X" military, chain of command model to "Theory Y," involving participative management and the use of employee involvement (EI) systems.

John W. Kendrick, *Policy Implications of the Slowdown in U.S. Productivity Growth, reprinted in*, Productivity Growth and the Competitiveness of the American Economy 75, 102 (Stanley W. Black ed., 1989).

The reason for the philosophical shift is simple:

> In a traditional, hierarchical organization, the primary role of employees is to comply with direction. The newer approach realizes that we expect and, in fact, need our employees to be active participants in improving business performance. . . . These two mind-sets have very different implications for the way we think about people. The traditional mind-set

> stresses control issues, particularly cost control. It regards people as a cost of doing business . . . . The emerging mind set suggests that we view people as assets—and assets should be developed. Thus encouraging our employees' creativity and capabilities can be a strategic method for improving our competitive position.

Jerry L. McAdams & Elizabeth J. Hawk, Capitalizing on Human Assets 9 (1992).

Employee involvement is a management tool that is designed to increase quality, productivity, and efficiency, and generally make the company better. Employee involvement is not just a management philosophy, however; it is a recognition of the modern workplace reality that management does not always know what is best and that the interests of workers and management are not always adverse.

Workers—as the individuals most intimately involved with production and customer satisfaction—possess valuable insight into means of improving the company. Company improvement, in turn, is inseparably intertwined with many interests that are important to employees—*i.e.*, safety, morale, profitability and job security.

Thus, although the purpose of employee involvement is productivity and efficiency, issues that must inevitably be considered to achieve those goals include safety, scheduling, incentives and all other conditions of employment that affect productivity, quality, and efficiency. *See Electromation, Inc.*, 309 N.L.R.B. 990, 1008 (Member Raudabaugh, concurring) ("It is hard to imagine an employee committee that would be able to avoid these matters completely. Even if the committees stated purpose is to deal only with such entrepreneurial concerns as product quality and workplace efficiency, it seems clear that the committee, in order to achieve its purpose, would have to consider one or more of the subjects [that would bring it within the Section 2(5) definition of labor organization]").

Because the interests of employees often coincide with management's, workers can also benefit from employee involvement in such areas as increased safety, better scheduling, improved morale, increased profits, and greater job-satisfaction. These are *collateral* benefits, however, and not the result of interactions with a group of employees *representing the interests of the workers.* Rather, these benefits spring from the commonality of interests between workers and management and are brought about through input from a group of employees *acting in the interests of the company.* In any event, the issues involved in this case have concrete importance for workers and management alike.

Finally, even if the qualitative importance and sheer volume of these programs do not, by themselves, sufficiently convey the significance of this issue, the academic treatment of the question certainly should. Few issues of federal labor law have generated as much concern and interest as the legality of employee involvement.[1]

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[1] *See, e.g.*, Rafael Gely, *Whose Team are You On? My Team or My Team?* 49 Rutgers L. Rev. 323 (1997); Nancy K. Kubasek, Wetley J. Hiers, Shannon T. Browne & Carrie Williamson, *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the NLRA*, 34 Harv. J. on Legis. 53 (1997); Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DePaul Bus. L.J. 159 (1996); Madelyn C. Squire, *Electromation: A Metaphor for the Ills of the NLRA—Is a Representation Standard a Cure?*, 73 U. Det. Mercy L. Rev. 209 (1996); Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. Corp. L. 657 (1996); Jon Blumenthal, *Remedying Electromation, Inc. v. NLRB and its Progeny: The Future of Employee Participation Programs*, 5 Kan. J.L. & Pub. Pol'y 193 (1996); Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 Notre Dame L. Rev. 216 (1996); William B. Gould, IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 Creighton L. Rev. 3 (1996); A.B. Cochran, III, *We Participate, They Decide: The Real Stakes in*

As one can clearly see, the extent to which employee involvement structures constitute labor organizations is a question of vital national concern.

B. The Extent to Which Employee Involvement Structures Constitute Statutory Labor Organizations Has Not Been Fully Resolved by This Court

Thirty years ago, this Court addressed, in part, what it considered to be an important question of federal labor law—the definition of "labor organization" under Section

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Revising Section 8(a)(2) of the National Labor Relations Act, 16 Berkeley J. on Employment & Lab. J. 458 (1995); Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. Cin. L. Rev. 1379 (1995); Samuel Estreicher, *Employee Involvement and the Company Union Prohibition: The Case For Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125 (1994); Robert B. Moberly, *The Worker Participation Conundrum, Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 Wash. L. Rev. 331 (1994); Note, *Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 Harv. L. Rev. 678, 685 (1994); John S. Lapham, *Enhancing Employee Productivity After Electromation and Dupont*, 45 J. of Urban and Contemporary L. 255 (1994); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. Rev. 1127 (1993); Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 Yale L.J. (1993); Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 Geo. Wash. L. Rev. 1812 (1993); Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 U.C.L.A. L. Rev. 571 (1992); Steven I. Locke, Note, *Keeping Sections 2(5) and 8(a)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees Through Electromation, Inc.*, 10 Hofstra Lab. L.J. 375 (1992); Shaun G. Clark, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 Yale L.J. 2021 (1987); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662 (1983).

2(5) of the NLRA, 29 U.S.C. § 152(5). *See NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210 (1959). That section provides that the term labor organization includes:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (emphasis added).

In *Cabot Carbon*, the Court concluded that the critical phrase "dealing with" was broader than the term "bargaining with," and therefore an employee committee could be found to be a statutory labor organization even if it "avoided the usual concept of collective bargaining." *Cabot Carbon*, 360 U.S. at 210-11. However, while the Court was clear as to what "dealing with" is not—*i.e.*, "dealing with" is not synonymous with "bargaining with"—it was equally unclear as to what "dealing with" is. In other words:

> *Cabot Carbon*'s rejection of the notion that "dealing with" is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if "dealing with" is less than bargaining, what is it more than?

Electromation, Inc., 309 N.L.R.B. 990, 1002 (Member Devaney, concurring). A meaningful and authoritative answer to this question is imperative.

C. Whether an Employee Involvement Structure Constitutes a Statutory Labor Organization Almost Invariably Is Determinative of the Structure's Legality

Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), provides that "it shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation

or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2).

The NLRB has been quite clear as to what constitutes "domination" as contemplated in the Act.

> Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function.

Electromation, Inc., 309 N.L.R.B. 990, 995 (1992) (emphasis added). In making the domination determination, the Board examines factors such as whether the employer initiated the group or team (Pet. App. at 25a), the degree to which management sets the agenda (*id.* at 24a), and the composition and selection of members (*id.* at 24a-25a). Significantly, the employer's motive for instituting the program, and whether employees would reasonably perceive the program as a substitute for collective-bargaining are not considered relevant to the 8(a)(2) analysis. *See Electromation*, 309 N.L.R.B. at 995.

Although *amici* disagree with the Board's method for determining "domination," [2] it is clear that under the

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[2] *Amici* believe that the Board erroneously found itself compelled to disregard criteria such as employer motive in determining 8(a)(2) violations by this Court's decision in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939). As explained more fully below, we agree with Member Raudabaugh that the Board is incorrect, and "that there is substantial doubt that the Supreme Court would now decide *Newport News* exactly as the Court had decided it in 1938." *Electromation*, 309 N.L.R.B. at 1012 (Member Raudabaugh, concurring).

Board's analysis, employee involvement or participation programs almost invariably will run afoul of Section 8(a)(2). This is because employee involvement structures are *management tools*, not mechanisms for dealing with employees or their representatives in the same sense that traditional labor organizations deal with employers. The purpose of employee involvement programs is to improve quality, efficiency, and productivity—*i.e.* to improve the company itself. As a result, such programs nearly always are creations of management.[3]

Similarly, the very nature of the programs—*i.e.* employee *involvement* or employee *participation*—indicates that membership cannot generally be limited exclusively to workers.[4] The essence of these programs is that employees become *involved in*, or *participate in*, the *management of the company for the benefit of the company.*

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[3] As a practical matter, the instances where employees unilaterally, and on their own initiative, create programs to improve quality, productivity, and efficiency are, to say the least, highly unusual. In a survey conducted by Michael LeRoy of companies that maintained employee involvement programs, employees created the "teams" only 2.6% of the time. *See* Michael H. LeRoy, *"Dealing With" Employee Involvement In Nonunion Workplaces: Empirical Research Implications for the TEAM Act and Electromation*, 73 Notre Dame L. Rev. 31, 77 (1997).

[4] One form of employee involvement, the so-called self-directed work team, involves limited management participation. This type of team appears to be lawful under Board precedent. *See General Foods*, 232 N.L.R.B. 1232 (1977). Self-directed work teams, however, are a somewhat limited form of employee involvement structure that is not suitable for every workplace. *See* Michael LeRoy, *"Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the TEAM Act and Electromation*, 73 Notre Dame L. Rev. 31, 75 (1997) (empirical study indicated that eighty-five percent of employee involvement programs have management participation). Even self-directed work teams, however, are subject to some management constraints. As a practical matter, management ultimately will maintain veto power over these structures even if, in a particular case, that veto power has not been exercised.

Such a system will almost always require management participation: that is precisely what employees are being involved in. Moreover, because the workers are participating in the management of the firm—as opposed to *representing employees* (in the true sense of a labor organization)—the agenda unavoidably must be controlled by management to some degree. *See, e.g., Electromation*, 309 N.L.R.B. at 1010 (Member Raudabaugh, concurring) ("Contemporary EPPs [employee participation plans] are often set up by employers with the lawful motives of enhancing morale, communication, product quality, and increasing productivity. To achieve these goals, the employers usually retain some degree of control over the EPPs.")

As a result, under the NLRB's present interpretation of Section 8(a)(2), employee involvement structures that are found to be "labor organizations" almost invariably will be found to be dominated by the employer.

D. The NLRB Has Been Unable to Provide Meaningful or Rational Guidance on the Extent to Which Employee Involvement Structures Constitute Labor Organizations Under Section 2(5) of the NLRA

Despite the importance of the issue, the National Labor Relations Board, as well as the lower federal courts, have been unable to provide meaningful or rational guidance on the extent to which employee involvement structures constitute labor organizations under Section 2(5).

The statute defines the term labor organization to include:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (emphasis added). As explained above, this Court, has determined the upper limit of the term "dealing with": "dealing with" is something less than "bargaining with." *See Cabot Carbon*, 360 U.S. at 210. However, the Board has consistently failed to provide a satisfactory interpretation of the term's lower limit.

As the Board again explained in its decision below,

> dealing with contemplates "a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management." *Electromation, Inc.*, 309 N.L.R.B. 990, 995 fn.21 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). The bilateral mechanism thus ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management and management responds to these proposals by word or deed. *E.I. DuPont & Co.*, 311 N.L.R.B. 893, 894 (1993).

(Pet. App. at 21a).

In short, according to the Board, a company may lawfully maintain an employee involvement structure so long as it does not consider—actually or apparently—any proposals that the structure generates. Whatever Congress intended to mean in Section 2(5), it certainly cannot be this. Despite the vast experience that the members of *amici* possess with regard to business and human resource management, and quality improvement, we have been wholly unable to find the utility of a law that allows us to implement a program *on the condition that we totally disregard the results of that program.*

In an attempt to reduce the Orwellian impression that this policy evinces, the Board readdressed the issue at length in *E.I. duPont de Nemours & Co.*, 311 N.L.R.B. 893 (1993), to "show that there is some room for lawful cooperation under the Act." *Id.* at 893. The *duPont* holding, however, is more style than substance.

According to the Board, employee committees created for the purpose of "develop[ing] a whole host of ideas" are not "dealing with" the employer. *Id.* at 894. "Management may glean some ideas from this process, and indeed may adopt some of them. If the group makes no proposals, the 'brainstorming' session is not dealing and therefore not a labor organization." *Id.*

Although literally, the words "proposal" and "idea" can have separate meanings, in this context, the Board creates a distinction without a difference. As a practical matter, there is no difference between employee conclusions phrased in terms of ideas and those phrased as proposals. In other words, it is hard to imagine how a statement to the effect: "I have an idea, maybe we could . . ." would constitute a lawful "idea" as opposed to an unlawful "proposal." In any event, Congress could hardly have intended that such an important question turn on such an insignificant distinction.

The Board's meaningless and irrational definition of "dealing with," although sufficient by itself, is not the only Board failure that warrants review of this issue by the Court. The Board consistently has failed to decide whether an employee involvement structure must act in a representational capacity in order to constitute a labor organization. *See Electromation, Inc.*, 309 N.L.R.B. at 994 n.20; (Pet. App. at 23a n.6). Petitioner has thoroughly and persuasively addressed the legal arguments on this point, *see* (Pet. at 8-11), and *amici* will not repeat those concerns here. Nevertheless, employee involvement programs possess certain general characteristics, discussed below, that are vital to an analysis in this area.

Unlike labor unions, employee involvement structures *do not* establish mechanisms in which workers represent the *interests of other workers.* On the contrary, employee

involvement entails worker participation in the management of the company *in the interest of the company.*[5]

It may well be that the views expressed by employees who serve in employee involvement structures are *representative of* those of other employees and as such may be of considerable value to the company in assessing the potential effects of policies being considered. However, this is far different from the kind of representation that must be provided by labor organizations. Unlike employee involvement structures, unions represent the *interests* of the employees in dealings with the employer. It is employer attempts to impose that kind of representation on employees that Section 8(a)(2) was intended to prohibit.[6]

In sum, because the NLRB has been unable to articulate a rational and meaningful standard regarding the extent to which employee participation programs constitute statutory labor organizations, and because these programs are essential to economic success in the global economy, this Court should review the issue.

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[5] Contrary to the conclusion of the Board, the fact that, in this case, the employee members of the Plant Council were elected by the workers does not establish, per se, that these individuals acted in a representational capacity. Election is simply a method of selection which may or may not involve representation. For example, many state judges are elected to office, not because the judges represent particular interests or constituents, but because the voters have determined that they are the most qualified for the job. Similarly, athletes are elected to their respective Halls of Fame, not because they represent other athletes, but because they are the most deserving of the position.

[6] The following example helps illustrate the distinction between representing views and representing interests. The production-line workers of company X generally agree, and propose to management, a particular method of production that is less labor intensive and more efficient. This view, however, which is representative of the *views* of the workers, nonetheless could be in direct conflict with the *interests* of the workers to the extent that certain workers could lose their jobs if the plan was implemented.

II. THE NLRB HAS ERRONEOUSLY CONCLUDED THAT IT IS COMPELLED BY A DECISION OF THIS COURT TO DISREGARD EMPLOYER MOTIVE AND EMPLOYEE PERCEPTIONS IN DETERMINING WHETHER AN EMPLOYER HAS DOMINATED THE FORMATION AND ADMINISTRATION OF A LABOR ORGANIZATION IN VIOLATION OF SECTION 8(a)(2)

The NLRB has erroneously concluded that it is compelled by this Court's decision in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939), to disregard factors such as employer motive and employee perception in determining whether an employer has dominated the formation and administration of a labor organization in violation of Section 8(a)(2). *See Electromation, Inc.*, 309 N.L.R.B. at 995 n.24; *id.* at 1005 n.5 (Member Oviatt, concurring). Since *Newport News* was decided, however, there have been significant changes in both the law and economy that require re-examination of this issue by the Court.

As originally drafted, Section 8(a)(2) was designed to arrest the employer practice of establishing "sham" unions for the purpose of preventing employees from choosing real union representation. Indeed, during consideration of the Wagner Act in 1935, Senator Wagner cited studies showing that more than two-thirds of the "company unions" then in existence were established after enactment of the National Industrial Recovery Act of 1933, which had been designed to recognize the right of employees to bargain collectively. 79 Cong. Rec. 7650 (1935), *reprinted in*, 1 N.L.R.B., *Legislative History of the National Labor Relations Act*, 1935 (1959). This fact was confirmed by a 1935 study conducted by the Bureau of Labor Statistics which found that 64% of these company unions were formed in response to union activity. Bureau of Labor Statistics, *Characteristics of Company Unions, 1935* 62 (1937).

Modern employee involvement structures, however, are in no way like the company unions prevalent during the first half of this century. *See, e.g.*, Michael LeRoy, *"Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromation*, 73 Notre Dame L. Rev. 31, 78 (1997) (extensive survey "disclos[ed] no evidence that teams are like company unions from the 1930s"). The purpose of these programs is to involve employees in the management of the company in order to increase quality, productivity, and efficiency, not to supplant legitimate unionization.

Furthermore, since the Court's decision in *Newport News*, the law itself has changed. Passage of the Taft-Hartley Act in 1947 dramatically altered the fundamental purpose of the NLRA from a policy of industrial peace through unionization to a policy of industrial peace through employee free choice. When legitimate employee involvement structures are established—*i.e.* those programs with neither the purpose or effect of inhibiting employee free choice—they should not run afoul of federal labor law. Indeed, the prevalence of employee involvement structures in *unionized* workplaces demonstrates that employee participation and employee free choice can easily co-exist. By the same token, employees freely choosing non-unionized workplaces should not be barred from participating in the management and critical decisionmaking of their companies.

Newport News, which was decided in 1939, could not have considered these important changes in the law and economy. We agree with Member Raudabaugh that "there is substantial doubt that [this Court] would now decide *Newport News* exactly as [it] did in 1938." *Electromation, Inc.*, 309 N.L.R.B. at 1012 (Member Raudabaugh, concurring).

Because the Board nevertheless finds itself bound by this Court's prior decision, and because legitimate em-

ployee involvement is essential for success in today's economy, the Court should address whether employer motive and employee perceptions are relevant factors in determining whether employee involvement structures violate Section 8(a)(2) of the NLRA.

III. THE ISSUES INVOLVED IN THIS CASE ARE QUESTIONS OF LAW THAT PROPERLY SHOULD BE RESOLVED BY THIS COURT

The issues presented in this case—which ultimately will determine the extent to which employee involvement structures are lawful under the NLRA—are questions of existing law, not public policy, that properly should be resolved by this Court.

It is true that these issues have created much interest and discussion in the public policy arena as well. In fact, bills have been generated in each of the last two Congresses addressing the issue. *See* Teamwork for Employees and Managers Act of 1997, S. 295, 105th Cong. (1997); Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1995). Nevertheless, this continuing public policy debate concerning what the law *should be*, does not reduce the need for a definitive statement of what the law *is*. On the contrary, if the current legislative debate on this issue demonstrates anything at all, it demonstrates only that no one can state with certainty the extent to which employee involvement is permitted under *existing law*.[7]

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[7] *Compare* S. Rep. No. 105-12, at 12 (1997) ("The need for clarification of the legality of employee involvement programs has since moved far beyond the specific facts of the *Electromation* decision. The breadth of the relevant provisions of the NLRA left employers and employees in a legal never-never land."); H.R. Rep. No. 104-248, at 11 (1995) ("The breadth of the relevant provisions of the NLRA combined with the confusion created by the four opinions in the [*Electromation*] decision have left the myriad employers and employees attempting to establish cooperative arrangements in the workplace in a legal never-never land."); *and*

That is precisely the kind of question that is appropriate for review by this Court. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 566 (1988) ("it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.")

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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142 Cong. Rec. S7487 (daily ed. July 9, 1996) (statement of Sen. Warner) (". . . in the course of the hearing in the Small Business Committee, we had employers come up who went ahead and violated the law knowingly [by establishing employee participation programs] and take the risk of being sued . . ."); *with* S. Rep. No. 105-12, at 31 (1997) (minority views) ("The majority would have us believe that lack of clarity in the law has thrown employers into doubt about the legality of employee involvement, justifying the drastic revision they seek. There is no serious problem with clarity now."); H.R. Rep. No. 104-248, at 31 (1995) (minority views) ("The majority contends that the NLRB's decision in *Electromation, Inc.* interferes with the adoption of these forms of employee involvement. That is simply not true . . ."); *and* 142 Cong. Rec. S7615 (daily ed. July 10, 1996) (statement of Sen. Murray) ("Employee committees, work teams, and quality circles that discuss questions of efficiency, productivity, quality, and work practices are currently allowed. Nothing prevents these teams from existing today . . .").